

THE HIGH COURT

[2009 No. 11576P]

BETWEEN

PATRICK MCGLINCHY

PLAINTIFF

AND

SILE RYAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 27th day of October, 2010.

1. Object and scope of this judgment

1.1 In my judgment dated 21st July, 2010 (the July judgment) I made findings on the issues raised by the plaintiff as to the conduct of the Inquiry before the Adjudicator on 7th and 8th December, 2009. I found that the Adjudicator was correct in deciding to proceed with the Inquiry on the basis of receiving the video tape evidence and accompanying expert evidence referred to in the judgment. However, I found that the Adjudicator was incorrect in ruling that the complaints in relation to D.M., insofar as they were the same as the allegations which form the basis of the criminal charges on which the plaintiff was acquitted, should proceed at the Inquiry, although, as I set out in the judgment, it was not clear to what extent the complaints and the charges in the criminal proceedings overlapped. What was left at large was the consequences of the plaintiff's withdrawal from the Inquiry in the light of those findings, which I indicated fell to be determined in accordance with the law of contract. The matter having been re-listed to enable the legal representatives of the parties to address the outstanding issue, the object of this judgment is to address that issue.

1.2 The plaintiff's withdrawal from the Inquiry has to be assessed in the context of what subsequently occurred between the plaintiff and the defendant up to the initiation of these proceedings and the stance adopted by the plaintiff in these proceedings and the reliefs sought by him against the defendant.

1.3 No further evidence was called by either party at the resumed hearing. However, counsel for the defendant opened the correspondence which passed between the defendant and the plaintiff and their respective legal representatives from 7th March, 1997, when the plaintiff was informed that he was being suspended on full pay, to the initiation of the judicial review proceedings by the plaintiff against the defendant and the Health Board in 2008. The objective of so doing was to support the contention made in paragraph 75 of the defence, in which it was acknowledged by the defendant that the plaintiff from time to time sought to be reinstated in his position as teacher but it was denied that the plaintiff had co-operated in that regard with the defendant, the defendant alleging that the voluminous correspondence between the parties and their legal advisers illustrates the ongoing obstructive attitude of the plaintiff to the school in dealing with the allegations against him.

1.4 Given that the defendant has addressed not only the consequences of the plaintiff's conduct in relation to the terms of settlement of the judicial review proceedings, which was characterised as a "sub-set" of the contractual relationship between the plaintiff and the defendant, but also the contractual relationship of the parties under the plaintiff's contract of employment from 1997 onwards, it is appropriate to recall the broader context of these proceedings and, in particular, the following matters:

(a) The plaintiff was suspended on full pay in March 1997 and that was his status until his suspension was lifted by virtue of Clause 1 of the terms of settlement of 15th May, 2009. However, he was "re-suspended" by the defendant in its letter of 18th December, 2009 on the basis of the allegations made in that letter, which I have summarised in paragraph 4.2 of the July judgment. The "re-suspension" was on full pay. As I understand it the plaintiff continues to be paid. However, he is paid not by the defendant or the school but by the Department of Education. The correspondence opened by the defendant reveals that the Department of Education had some input into the manner in which the defendant inter-acted with the plaintiff, at least from mid-2005 onwards.

(b) The Health Board initiated an investigation into allegations against the plaintiff which had been made to it by the parents of pupils after March 1997. However, that investigation was put on hold after the plaintiff was arrested in June 1997 and remained so until after he was acquitted in the Dublin Circuit Criminal Court in November 2002. The Health Board resumed its investigation after the plaintiff's acquittal. As I recorded at paragraph 1.5 of the July judgment, it concluded its investigation in November 2003, when it made adverse findings against the plaintiff and, in particular, found that he remained a risk to vulnerable children. While the Health Board made those findings, it took no action against the plaintiff. It would be inappropriate to speculate as to why it did not. However, I accept that the existence of the findings made by the Health Board made it impossible for the defendant to allow the plaintiff to return to his teaching duties. I also accept, as the defendant contended, that the plaintiff alone had *locus standi* to challenge those findings. The only alternative course was for the school to instigate its own investigation into the allegations which had been made against the plaintiff and as to the suitability of the plaintiff to be allowed to return to teaching vulnerable students in the school. It obviously had difficulty in pursuing that course without the assistance of the Health Board given the pendency of civil actions in the High Court arising from the allegations against the plaintiff.

(c) What eventually happened was that the plaintiff initiated the judicial review proceedings, which were settled on the terms of settlement, which are outlined at paragraph 2 in the July judgment. As I recorded, the terms of settlement provided that the settlement was "in full and final settlement of all claims (howsoever arising) between the parties". At the most recent hearing neither side sought to attach weight to that provision. However, it seems to me that the Court's function in these proceedings, insofar as it extends beyond the agreement embodied in the terms of settlement, can only relate to determining the position of the plaintiff vis-à-vis the defendant under his contract of employment in relation to

matters which arose subsequent to the terms of settlement, insofar as that has been addressed at the hearings.

1.5 The agreement embodied in the terms of settlement was a tri-partite agreement between the plaintiff, the defendant and the Health Board. However, the Health Board's obligations were limited to using its best endeavours to ensure that its servants or agents or former servants or agents would co-operate with the Inquiry (Clause 3) and to furnishing all reports or documents (including any assessment or validation) concerning the plaintiff relevant to the subject matter of the Inquiry and to confirmation of which of the author or authors of the documents would be available to give evidence (paragraph 6 of Annex 1). No issue arises as to the performance by the Health Board of its obligations under the terms of settlement.

1.6 As regards the obligations of the defendant under the terms of settlement, it is common case that the suspension of the plaintiff was lifted, as was provided in Clause 1. The other obligation of the defendant was to establish the Inquiry in accordance with the terms of reference set out in Annex 1. The Adjudicator was appointed and, accordingly, that obligation was fulfilled. So also was the obligation of the defendant to furnish the documentation produced by the Health Board to the Adjudicator and to the plaintiff. Apart from being bound by the provisions of Annex 1 in relation to the conduct of the Inquiry, the remaining obligation imposed on the defendant was that, in the event that the Adjudicator concluded that the allegations against the plaintiff are not well founded and that the plaintiff did not pose or does not pose a threat to children, the defendant agreed that the plaintiff should resume his employment (which I take to mean his teaching duties) at the earliest opportunity. Because of what happened at the Inquiry, that event did not occur, so that the obligation of the defendant to allow the plaintiff to resume his teaching duties did not arise.

1.7 The primary obligation of the plaintiff under the terms of settlement was to attend the Inquiry and co-operate with it. He was also bound by the provisions of Annex 1 in relation to the conduct of the Inquiry. The remaining obligation imposed on him was that, in the event that the Adjudicator should conclude that the allegations against him, or any of them, are well founded and/or that the plaintiff posed or poses a threat to children, he agreed that he would resign forthwith. In view of what happened at the Inquiry on 8th December, 2009 and subsequently, that event did not occur, so that under the terms of settlement the obligation of the plaintiff to resign did not arise.

1.8 As is clear from the foregoing analysis, the consequence of the plaintiff's withdrawal from the Inquiry and his subsequent actions, including the prosecution of these proceedings, irrespective of the findings made in the July judgment, cannot entail either –

(a) the defendant being obliged to allow the plaintiff to resume his teaching duties, or

(b) the plaintiff being obliged to resign his position.

1.9 Against that background, I will now consider the respective positions adopted by the parties at the recent hearing.

2. The respective positions of the plaintiff and the defendant

2.1 The Court has had the benefit of written submissions from counsel for the plaintiff and counsel for the defendant, which were supplemented by oral submissions. I do not consider it necessary to outline the submissions in detail.

2.2 The position adopted on behalf of the plaintiff was that the agreement embodied in the terms of settlement was discharged owing to breach of contract on the part of the defendant, in respect of which the plaintiff is entitled to recover damages. The plaintiff's contract of employment remains in place. In relation to that contract, it was submitted that the Court has two options. It can do nothing, thus leaving the parties to resolve the matter outside these proceedings. Counsel for the plaintiff made it clear that the practicalities of that aspect of the matter were recognised. The alternative position, which, notwithstanding what is pleaded by the plaintiff, I understood not to be pressed too strenuously, was that the Court should grant the plaintiff an injunction entitling him to return to work on the basis that the attempt to re-suspend him was unlawful, in circumstances where he risked losing his remedy if he did not act promptly and could be found to have affirmed the breach of agreement alleged on the part of the defendant.

2.3 The position of the defendant was that the plaintiff had acted in breach of his obligation to co-operate with the Inquiry, which constituted a fundamental and repudiatory breach of the agreement embodied in the terms of settlement, entitling the employer to treat that agreement as at an end. Further, the plaintiff had acted in breach of the implied covenant for mutual trust and confidence in his contract of employment, so that the defendant was entitled to adopt the course proposed in its letter of 18th December 2009. In the circumstances, it was submitted that the plaintiff is not entitled to any of the reliefs sought.

3. Breach on the part of the defendant?

3.1 The plaintiff's case was that, by seeking to adduce evidence of the allegations made by D.M. which were the subject of the criminal charges against the plaintiff and by urging the Adjudicator to make the finding to admit evidence of those allegations which the Court has found to be incorrect, the defendant acted in breach of the terms of settlement, which expressly provided that the Adjudicator would conduct the Inquiry in conformity with the accepted rules of evidence and contained an implied term that the Inquiry would be carried out in accordance with fair procedures.

3.2 The defendant's response was that nothing done on behalf of the defendant precipitated a situation which rendered the conduct of the Inquiry inherently unfair. The Adjudicator was acting independently of the parties. He was not the agent of the defendant. The fact that the Court has found the finding he made in relation to the complaints of D.M. to be incorrect does not constitute a breach of contract on the part of the defendant.

3.3 I am satisfied that the points made by the defendant are sound in fact and in law. Accordingly, in relation to what occurred during the hearing of the Inquiry on 7th and 8th December, 2009, the defendant cannot be found to have been in breach of the terms of settlement, the termination of which, as will be illustrated, was precipitated by the conduct of the plaintiff.

4. Breach on the part of the plaintiff?

4.1 The defendant's case, based on an analysis of what transpired before the Adjudicator following his ruling on the hearsay issue and on the acquittal issue as reflected in the transcript, is that the plaintiff deliberately decided not to participate further in the Inquiry and withdrew. This, it was submitted, was akin to the plaintiff abandoning a civil action midway through the hearing. In the light of his agreement to co-operate with the Inquiry, it was submitted that, by withdrawing from it completely, the plaintiff was guilty of a repudiatory breach of contract, which entitled the defendant to treat the terms of settlement as at an end.

4.2 Counsel for the defendant relied on one English authority, which is of some, if limited, assistance. That was the decision of the House of Lords in *Bremer Vulkan v. South India Shipping* [1981] 1 All ER 289. In that case, an arbitration clause in a contract was invoked and the arbitration commenced. One of the parties sought an injunction restraining the other party from proceeding with the arbitration because of alleged dilatoriness on the part of that party from the time the arbitrator was appointed. The House of Lords

overturned the decision at first instance and the affirming decision of Court of Appeal granting the injunction, on the basis that a court did not have jurisdiction to dismiss a claim in an arbitration for want of prosecution or to grant an injunction restraining a claimant from proceeding with the arbitration if he had been guilty of inordinate and inexcusable delay. However, Lord Diplock, having commented that there was no previous reported case in which the Court had granted an injunction to restrain a party from proceeding with an arbitration under an arbitration agreement on the ground that he had committed a repudiatory breach of an arbitration agreement in the course of those proceedings before they had been terminated by the issue of an award, stated (at p. 298):

"The primary obligations of both parties that arise then are contractual, whether express, or implied by statute or included by necessary implication in the arbitration clause. Breach of any of them would give rise to a general secondary obligation to pay compensation (damages), although this may well be nominal; but if the breach were such as to deprive the other party of substantially the whole benefit which it was the intention of the parties he should obtain from the mutual performance by both parties of their primary obligations in relation to the reference of the particular dispute to arbitration, i.e. what in an ordinary synallagmatic contract would be a repudiatory breach, I see no ground in principle why the party not in breach should not be entitled to elect to put an end to all primary obligations to proceed with the reference then remaining unperformed on his part and on the part of the party in default, and, in appropriate cases, to obtain an injunction to restrain the party in default from continuing with the reference to arbitration of that particular dispute."

4.3 The position of the Adjudicator was analogous to the position of an arbitrator, in the sense that he was required to make a determination in relation to matters the subject of the terms of reference which would be binding on the plaintiff and the defendant, albeit that the statutory provisions which regulate the conduct of arbitrations did not apply to the Inquiry. Therefore, in principle, if the conduct of the plaintiff in withdrawing from the Inquiry amounted to a repudiatory breach of the contract embodied in the terms of settlement, the defendant was entitled to regard herself as discharged from that contract. The question which arises for determination by the Court is whether the conduct of the plaintiff on 8th December, 2009 amounted to an express renunciation of the plaintiff's obligations under the terms of settlement or, alternatively, gave rise to the implication that the plaintiff intended that he would no longer perform his obligations thereunder without justification.

4.4 Following the Adjudicator's ruling and a short adjournment the transcript discloses the following exchanges between counsel and the Adjudicator:

"[Plaintiff's counsel]: ... The position is that we are not happy with the ruling and we will take the matter elsewhere.

[Adjudicator]: Very good.

[Defendant's counsel]: In those circumstances, I would just like it noted for the record that [the plaintiff] has refused to participate in the Inquiry any further in accordance with the Terms of Reference and the Inquiry is thereby frustrated.

[Plaintiff's counsel]: No, no, I have already indicated I am exercising my rights, in law, to take the matter elsewhere. There is no question of refusing to do anything.

[Adjudicator]: Well, thank you all for your attendance and submissions. The one thing that I now am -- just in terms of my position, to be clear: I have made a ruling. My position is I am inviting [the defendant's counsel] to proceed to the next stage. I have an application to adjourn the matter from [the plaintiff's counsel], to enable him to proceed elsewhere, as he put it himself. Now, in the sense, do we want to put a date on when things might be resumed or do we want to fix a time or --

[Plaintiff's counsel]: I think *sine die*, in reality.

[Adjudicator]: Well, your application is to adjourn it *sine die*?

[Plaintiff's counsel]: It is, yes, realistically, because I can't --

[Adjudicator]: One second now, that is a different application to the one that you have just made.

[Plaintiff's counsel]: Well, sorry, my application is not -- sorry, Chairman, my application is not to adjourn anything. I am simply indicating to the hearing that my instructions are to take the matter elsewhere.

[Adjudicator]: Then, that doesn't require an adjournment?

[Plaintiff's counsel]: Well, I don't think the proceedings should continue in the absence of [the plaintiff], but that is a matter for the Adjudicator --

[Adjudicator]: But what I want to ascertain now is, from the parties who have invited me here to adjudicate on this, is what they want me to do. Now, adjourning *sine die* means that there is no adjudication to continue, and I want to know is this -- take your issue off elsewhere, effectively is a termination of the adjudication because you don't wish to proceed on the basis of the ruling that I have made, isn't that right?

[Plaintiff's counsel]: That is a fair interpretation.

[Adjudicator]: Isn't that right?

[Plaintiff's counsel]: That is a fair interpretation.

[Adjudicator]: In those circumstances -- I don't want to waste everyone's time. I mean, it seems to me that, in those circumstances, the adjudication is at an end because you don't wish to participate in it on the ruling I have made. So this adjudication is complete and I am declaring myself to be *functus officio*, insofar as I can portentously call my position a *functus*, anyway.

[Plaintiff's counsel]: Very good."

After some short exchanges, which are not relevant to the issue which I am now addressing, the Adjudicator stated that the

adjudication was at an end. It seems to me that those exchanges can only be interpreted as an express renunciation by the plaintiff of his obligation under the terms of settlement to participate in the Inquiry to its conclusion.

4.5 Further, the matter was put beyond doubt, in my view, by the position adopted by the plaintiff in the letter his solicitor sent to the defendant on the following day, which is referred to at paragraph 4.1 in the July judgment. That letter made it clear that the plaintiff considered that the Inquiry had terminated and that he was entitled to be allowed to resume his teaching duties in the school.

4.6 The question remains whether the plaintiff has established a justification for the stance he adopted, which would prevent his conduct amounting to a repudiatory breach or a fundamental breach. Two points were made on his behalf.

4.7 The first was that there was no appeal open to him against the ruling of the Adjudicator which the Court has found to have been incorrect and, accordingly, he had no option but to adopt the course he adopted. The defendant's answer to that point was that it was open to the plaintiff to seek an adjournment of the Inquiry while he sought a review of the ruling of the Adjudicator, indicating that he would participate in the Inquiry on the basis of the finding of the Court following such review. However, the plaintiff chose not to pursue that course, and he thereby stymied any means by which an adjudication could be made which would allow him to resume his teaching duties, it was submitted by the defendant.

4.8 The second point was premised on the plaintiff being the innocent party who was entitled to terminate the contract embodied in the terms of settlement because of a breach thereof by the defendant, and was required to act promptly and decisively, if he wished to terminate, the plaintiff's counsel citing *An Bord Iascaigh Mhara v. Scallan* (High Court, 8th May, 1973, unreported) and *Lutton v. Saville Tractors* [1986] N.I. 327. The defendant's answer to that point, apart from denying any breach on the part of the defendant, was that the plaintiff was not compelled to withdraw from the Inquiry, but could have sought an adjournment while declaratory relief was sought and obtained in this Court, along the lines of the present proceedings. Further, it was submitted that the cases cited by the plaintiff, being cases where failure to repudiate was regarded as an acceptance by the buyer of the goods in a sale of goods context, are distinguishable from the sensitive circumstances of this case, which cannot be compared to a sale of goods contract.

4.9 As regards the first point, given the finding I have made in relation to the allegations made by D.M., the plaintiff was justified in adopting the position that for the Adjudicator to hear complaints in relation to D.M., insofar as they overlapped with the allegations by D.M. which formed the basis of the charges in the Circuit Court Criminal proceedings, would have amounted to an unfair procedure. However, I am satisfied that he was not justified in taking the view that the ruling of the Adjudicator to that effect absolutely absolved him from participating in the Inquiry and entitled him to withdraw from the Inquiry and to seek to resume his teaching duties forthwith. The plaintiff could have either allowed the Inquiry to continue and, if necessary, at the conclusion of the Inquiry challenged any adverse finding made by the Adjudicator on the basis of D.M.'s complaints. Alternatively, he could have sought an adjournment of the Inquiry to enable him to challenge in this Court the Adjudicator's ruling, on the basis that the Inquiry would continue following the conclusion of the challenge in accordance with the Court's finding.

4.10 As regards the plaintiff's second point, in my view, it is wholly misconceived because it is premised on the plaintiff being entitled to repudiate by reason of a breach on the part of the defendant. I have already found that there was no breach of the terms of settlement on the part of the defendant, not to mention a repudiatory breach.

4.11 Accordingly, I have come to the conclusion that there had been a repudiatory breach of the terms of settlement on the part of the plaintiff and that the defendant was entitled to treat the terms of the settlement as at an end.

5. Decisions on the reliefs claimed by the plaintiff and the form of order

5.1 I summarised the reliefs claimed by the plaintiff in these proceedings in paragraphs 5.2 and 5.3 of the July judgment.

5.2 Having held that the ruling of the Adjudicator on the acquittal issue was incorrect to the extent stated in the July judgment, that fact will be recorded in the order of the Court. Subject to that, the plaintiff is not entitled to any of the declaratory reliefs he has sought in relation to the hearing of the Inquiry and is refused the reliefs sought in paragraphs 4, 7 and 8 of the prayer in the statement of claim. Having found that the defendant was not in breach of the agreement embodied in the terms of settlement, the plaintiff is not entitled to a declaration that the defendant has failed to comply with the order of 15th May, 2009 sought in paragraph 3, nor is the plaintiff entitled to damages for breach of contract against the defendant.

5.3 The consequence of the plaintiff's conduct in withdrawing absolutely from the Inquiry and in seeking in the letter of 9th December, 2009 and in these proceedings to be allowed to resume his teaching duties forthwith, which amounted to a repudiatory breach of the terms of settlement, and the reaction of the defendant in accepting the repudiation and in treating the terms of settlement as at an end, is that the agreement embodied in the terms of settlement has terminated. That means that the plaintiff's contractual position vis-à-vis the defendant under his contract of employment is as it was before the terms of settlement were entered into. Therefore, the plaintiff's suspension is reinstated. The matters which gave rise to his suspension and its continuance until 15th May, 2009 remain unresolved. That being the case, there is no basis on which the Court could make a declaration that the plaintiff is entitled to resume his teaching duties, nor is there any basis for directing the defendant to permit him to do so. Therefore, the plaintiff is not entitled to orders in terms of paragraphs 1, 5 or 6. Nor can the defendant be restrained from conducting a further disciplinary process in relation to the plaintiff in accordance with his contract of employment or from acting on foot of that process. Therefore, the plaintiff is not entitled to the orders sought in paragraphs 2, 9 or 10.

5.4 The foregoing decisions have been arrived at without determining whether the withdrawal from the Inquiry by the plaintiff constituted gross misconduct and a breach of the plaintiff's contract of employment or a breach of the implied mutual covenant of trust and confidence therein. As I have recorded in the July judgment, only one witness was called at the hearing, the plaintiff. I have reviewed the evidence given by the plaintiff on 20th April, 2010. His evidence was confined to proving the settlement of the judicial review proceedings, the complaints which were before the Adjudicator, and what transpired at the hearing before the Adjudicator on 7th and 8th December, 2009. In the circumstances, it would be inappropriate to base any decision on the alleged breach of the terms of the plaintiff's contract of employment.

5.5 The effect of the foregoing decisions is that the plaintiff's contract of employment with the defendant remains in being. However, the findings of the Health Board in relation to the complaints made to it and to the effect that the plaintiff remained a risk to vulnerable children stand, although it is not clear on what authority the Health Board made those findings or whether the Health Board has any further function in relation to the plaintiff's employment. In agreeing the terms of the settlement, the plaintiff acknowledged that it would have to be established, *inter alia*, that he does not pose a threat to children before he could be allowed to resume his

teaching duties at the school. He also agreed to the mechanism whereby he was to have an opportunity of disputing the Health Board findings and establishing that he is not a risk to vulnerable children and that he should be allowed to resume his teaching duties. That agreement, which was mutually beneficial to the plaintiff and the defendant, has been discharged by the plaintiff's withdrawal from the Inquiry and his subsequent conduct, as I have decided on the basis of the authorities referred to by the parties.

5.6 That decision, it seems to me, is in line with the observations of O'Donnell J., with whom the other Judges of the Supreme Court agreed, in the recent decision in *Galway C.C. v. Kingston Limited* [2010] 2 ILRM 348, where he stated (at p. 370):

"Repudiatory breach is not so much concerned with the manner in which a breach is carried out, as with the significance of the obligation breached. It is difficult to conceive those circumstances where it could be said that notwithstanding abandonment of the site a contract still existed so that the employer must continue to perform it and would be left to its remedy in damages ... However it is not necessary, or perhaps desirable, to preclude all possible argument on this matter."

There the Supreme Court was concerned with an application to set aside the award of an arbitrator in circumstances where the defendant contractor had left the site (Eyre Square, Galway) before the works were completed. In this case, the significance of the withdrawal from the Inquiry by the plaintiff and the stance he adopted in the letter of 9th December, 2009 was that he chose to bring to an end the mechanism by which the agreed issues between the parties, that is to say, whether he should resign or whether he should be entitled to resume his teaching duties, were to be resolved, which it took the parties over 12 years after the commencement of his suspension to put in place. Unfortunately, to put it colloquially, the parties are "back to square one".