Neutral Citation Number [2007] IEHC 156

THE HIGH COURT

DUBLIN

Record No. 1239P/2006

MS. MARY BECKER

PLAINTIFF

THE BOARD OF MANAGEMENT OF ST. DOMINIC'S SECONDARY SCHOOL, CABRA, MARY KEANE, DEREK KICKHAM, PATRICIA FITZSIMONS, KATHLEEN CROWLEY, TIM CHADWIDCH, KEVIN BARRY AND MONICA KENNEDY

DEFENDANTS

Judgment of Mr Justice T.C Smyth delivered on the 1st day of May 2007

Mr. Justice Smyth: These proceedings were settled between the parties on 15th November 2006, after several hours of negotiations. Both parties had the benefit of legal advice and the Plaintiff also had the benefit of the advice and assistance of her Trade Union representative. The terms of settlement were reduced to writing and signed by the Plaintiff and her signature witnessed by her solicitor.

The Department, Minister for Education & Science was represented in an amicus curiae role by counsel to confirm to the Court, and to assure the parties that the time constraints in the closing dates for receipt of Applications for the Early Retirement Scheme for teachers' retirement at the end of the 2005/2006 school year would be waived in favour of the Plaintiff.

Subsequent to the settlement aforesaid, the parties sought to give effect thereto and the Plaintiff, became dissatisfied with the working out of the agreement and initiated these proceedings for: -

> (i) Specific performance of the agreement permitting the Plaintiff to continue teaching at third level, irrespective as to whether any such school or college is funded directly or indirectly by the Department of Education & Science, with an agreed prohibition preventing the Plaintiff from teaching at secondary level.
>
> (ii) In the alternative, a Declaration that no agreement or settlement was reached as between the parties upon the terms suggested, as alleged by the Defendants.

The substantive proceedings arose out of a dispute or disputes between the parties and elements of their relationship where there were many unhappy differences between the Plaintiff, who was a teacher in the Defendant school.

The terms of settlement (*inter alia*) provided as follows:-

> "1. It is hereby agreed that the parties will jointly apply to ERAC (Early Retirement Application Committee) for the Plaintiff to be entitled to early retirement on the grounds of irretrievable breakdown of the relationship between the Plaintiff and the Defendants.
>
> 2. The parties agree to adjourn the above entitled proceedings until the determination of the above application.
>
> 3. If the application is successful, the Plaintiff agrees to strike out the above entitled proceedings with no order as to costs.
>
> 4. The Defendant undertakes not to prosecute any disciplinary proceedings against the Plaintiff while the early retirement application is being processed.
>
> 5. In the event of the early retirement application being unsuccessful, the Defendant agrees not to prosecute any current disciplinary proceedings against the Plaintiff until after the above entitled action has been re-listed for hearing and heard.
>
> 6. On early retirement, if successful, the Plaintiff to be paid her lump sum and pension from date of retirement by the Department of Education.
>
> 7. The Defendant requests that the Plaintiff absent herself with immediate effect until the determination of the early retirement application and agrees to pay her, her full pensionable salary, until that date and the Plaintiff agrees.
>
> 8. If the application is unsuccessful, the Plaintiff to be permitted to resume employment forthwith."

The other five terms of the agreement are not relevant for present purposes.

On the same date as the settlement both parties acted in pursuance to paragraph (1) of the agreement and jointly applied to the ERAC for the Plaintiff to be entitled to early retirement on the grounds of an irretrievable breakdown in the relationship between them. In further part performance of paragraph 7 of the agreement, the Plaintiff absented herself with immediate effect until the determination by the ERAC. Part of the undisputed documentation in one of the several visits to Court since the settlement of the substantive action discloses that the terms and conditions of the Early Retirement Scheme for teachers were agreed at the Conciliation Council for teachers, which is comprised of representatives of the teacher unions, school management, the Department of Finance and the Department of Education & Science. The terms of the agreed scheme are set out in Circular PEN 22/05 (hereinafter referred to as the Circular). The Plaintiff's application to the ERAC includes a form of declaration which incorporates, by reference, the Circular.

The Circular, dated 15th November 2005, is a nine page document dealing with a wide range of matters and circumstances. The structure of the scheme consisted of three strands. Dr. Fords SC submitted, that strands 2 and 3 could not possibly arise in the Plaintiff's case. The logic of this submission is that Strand (1) applied and this related to teachers who are consistently experiencing professional difficulties in their teaching duties. In the course of her declaration, the Applicant stated:-

> "I have read the guidelines on the identification of professional difficulties (under the headings Expertise, Commitment and

> Ongoing Professional Difficulties) as set out in the Appendix to this application form. I apply under Strand (1), on the grounds that, in carrying out my teaching duties I am experiencing professional difficulties in the following areas:-"

Which are then set out in manuscript by the Plaintiff. In the Certification section of the declaration, there is the following query in printed form:-

> "NB 2: If you also are applying for early retirement under Strand (2), please say so. If not so applying, please state Strand (1) only. (Do not leave blank)."

The Plaintiff, by manuscript, confirmed she was applying under Strand (1) only. The guidelines aforesaid form part of the joint application documentation lodged with the ERAC.

The Circular (*inter alia*) provided details referable to Strand (1), and the processing of applications and in respect of future employment, specifically that:-

> "10.1 Acceptance by a teacher of early retirement under Strands (1) and (2) of this scheme will be subject to his/her agreement that she/he will not be eligible for future employment in any capacity as a teacher or/lecturer in any school or college recognised and funded directly or indirectly by the Department of Education & Science."

In the events, the application having been made in accordance with this regime, which I am satisfied and find as a fact, the Plaintiff as a fully informed adult willingly accepted and understood, the same was accepted and this acceptance was set out in a letter dated November 30th, 2006, addressed to the Plaintiff from the Secondary School Teachers' Superannuation Section of the Department of Education & Science. The response of the Plaintiff's solicitors (to the Defendant's solicitors) of 8th December 2006 (*inter alia*) stated:-

> "Our client has considered the offer and she instructs us that she is not prepared to accept the offer, unless amendments are made to paragraphs 5 and 6 of the conditions attaching to the offer.
>
> When our client submitted her application under Strand (1), she understood that she could not work as a teacher in any school run directly by the Department of Education & Science, however, she did not expect that the conditions would prevent her from working as a lecturer in any school or college recognised and funded directly or indirectly by the Department of Education & Science. Likewise, she did not expect the Department would seek to prevent her from working in any area of the public sector. Unless these conditions are amended, she is not prepared to accept the offer put forward by the Department and as a result a new hearing date will have to be fixed for the hearing of the above action."

The response of the Department (*inter alia*) stated:-

> "Ms. Becker's application under the scheme was accepted on an exceptional basis and was processed in accordance with the terms of the scheme. The Early Retirement Advisory Committee recommended that the Minister approve of the application under Strand (1) of the scheme and this approval was issued in line with the terms of the scheme. As I advised to you by phone in December last, the terms of this scheme are of general application to all teachers and the Department is not in a position to vary its terms in individual cases. The terms of the offer to Ms. Becker set out in the Department's letter of 30th November 2006, therefore, still stands."

The foregoing is the substantial factual background against which the Plaintiff claims specific performance of the settlement of 15th November, 2006. Dr. Forde SC for the Plaintiff advanced the case on the basis that it is one of contractual construction. There is no plea of non est factum nor any question of breach of warranty of authority by legal advisors as in *Gordon -v- Gordon* [1951] IR 301; 88 ILTR 6.

The submissions:

> 1) For the Plaintiff:
>
> a) That a third party ie., the Department was seeking to dictate the outcome of the settlement.

I reject this submission because, the Circular, which formed part of the Application, provided that:-

> "8.1 ERAC will consist of one nominee of the teachers' unions, one nominee of the school management/bodies and one nominee of the Ministers of Education and Finance."

The ERAC, as provided for in paragraph 8.2, clearly made a recommendation favourable to the Plaintiff and the acceptance of the application was indicated in the Department's letter of 30th November 2006.

> b) That the Plaintiff did not agree that Strand (1) would apply to her.

I do not accept this submission which is at variance with the documents she herself signed in making the Application to the ERAC.

The fact that the actual settlement document, signed on 15th November 2006, does not refer on its face to Strand (1) does not deprive it of application. The application to the ERAC has its context in the settlement, to seek to divorce it from its context is unreal and at total variance of the position of the Plaintiff, as recorded in her solicitor's letter of rejection of the offer, which she herself sought in the making of the application.

> c) The Plaintiff contends that she assumed she could obtain employment in private schools, even up to third level, but this was denied to her in the letter of 30th November 2006 from the Department.

I do not accept this submission because the conditions objected to, ie., 5 and 6, are respectively those provided for in Clauses 10.1 and 10.4 of the Circular, which were part of her application.

The Plaintiff cannot, at one and the same time, plead specific performance and a self induced frustration because of an unwillingness to accept the logical consequences of her own application.

d) That the terms of the settlement are vague and in particular paragraphs 1, 2 and 3 and that the court must seek to make sense of them; in particular the terms of settlement had to be reasonable in the terms of the Plaintiff's age (she was 54 years of age).

In the context of a claim for specific performance those submissions are made. In my judgment, this submission is untenable. The terms of settlement not only cater for the making of the Application to ERAC, but specifically provide for what is to happen if the application is successful (in paragraphs 3 and 6) or is unsuccessful (in paragraphs 5 and 8). Furthermore, it is impermissible in law to seek to imply terms into a written contract save in settled exceptional conditions which do not apply in the instant case.

e) That there was a failure to adhere in some fashion, unspecified, save as to contend that the Plaintiff was not lacking in either (competence, qualification or experience as a teacher) to the provisions of the Appendix to the application form.

This submission is at variance with the evidence, for the Plaintiff declared that she had read the guidelines on the identification of professional difficulties, as set out in the Appendix to the application form, and then continued:-

"I apply under Strand (1) on the grounds that, in carrying out my teaching duties I am experiencing professional difficulties in the following areas:

There has been an irretrievable breakdown of relationship between the Board of Management and I. Attempts were made to address the breakdown but the differences were so great that all attempts proved futile. Over the past number of years, I have been caused enormous stress and as a result of complaints against me (and by me) by colleagues and others, including the Board of Management, which have had a serious adverse affect on my life in the school."

The certification by the Board of Management states that it (too):-

"Has considered the application in the light of the guidelines on the identification of professional difficulties set out in the Appendix to this Application."

2) Submissions for the Defendant:

Mr. R. Horan SC submitted as follows:

a) The joint application to the ERAC and the settlement are clearly linked together and both parties agreed in the application form that Strand (1) only applied. This submission is consistent with the facts as I find them.

b) The Plaintiff whose primary degree was in languages and who had a Masters degree in IT Science, clearly knew what she was dealing with and was fully advised on 15th November 2006; and the gravamen of her complaint is not based on either pleas of non est factum or for rectification, but on her dissatisfaction with conditions 5 and 6 in the letter of 30th November 2006, which she had already accepted and acknowledged were applicable in Clauses 10.1 and 10.4 of the Circular.

I accept this submission as correct and sustainable; there were no caveats in the settlement. The outcome of both possibilities to the application (successful and unsuccessful) was, with commendable foresight, catered for.

c) It is not permissible for the court to imply a term or terms into a written contract merely because one party is dissatisfied with the result of its implementation and a fortiori the outcome cannot dictate the reasonableness of the terms sought to be implied.

In support of this submission, Mr. Horan cited the decision of Atkin LJ., in the Court of Appeal decision in *Tournier -v- National Provincial & Union Bank of England* [1924], (1KB 461 at 483):

"The question of what terms are to be implied in a contract is a question of law. In *Re: Comptoir Commercial Anversois and Power* [1920] (1KB 868); and the rules by which the court should be guided are contained in passages from the judgments of Lord Esher in *Hamyln -v- Wood* [1891] (2QB 488), and of Lord Watson in *Dakl -v- Nelson, Denkin & Co.* [1881] (6 App Cas. 38), cited in words substantially to the same effect (ibid at pp 899-900):

"The Court," he says "and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, would not have made the contract unless the term was included; it must be such as a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

The second authority relied upon by Mr. Horan SC was that of *Sweeney -v- Duggan* [1997] 2 ILRM 211, wherein the Supreme Court determined that:

"There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. First, a term not expressly agreed upon the parties may be inferred on the basis of the presumed intention of the parties. Moorcock (1889) (14 PD 64); *Shirlaw -v- Southern Foundries (1926) Ltd* [1939] (2KB, 206) applied. Secondly, a term may be implied, as a matter of law, independently of the intention of the parties, as a necessary legal incident of a definable category of contract, *Liverpool City Council -v- Irwin* [1977] (AC 237) considered - per headnote p. 212."

The matter was put succinctly by Murphy J. with characteristic conciseness as follows at p. 217:

"Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract, it must be not merely reasonable but also necessary."

In my judgment, in the instant case there was no warrant or basis for implying a term into the contract on the basis of reasonableness, much less of necessity. The parties struck a deal. It was clear and unambiguous and they both should be held to it. Second thoughts by one party do not mean that a further term, suitable or favourable to them, should be introduced on an ex post

facto basis. The words of Goulding J. in *O'May -v- City of London Real Property Co. Ltd*. [1979] (245 EG, 1065 at 1069) have a particular resonance:

> "After all, the purpose of legal contracts is to reduce the mutual dependence of parties on one another's morality."

Conclusion
In my judgment, the substantive action stands settled in the terms of settlement, dated 15th November 2006, and accordingly, I dismiss the Plaintiff's claim as sought and prayed in the Points of Claim, delivered on 12th March 2007, including and notwithstanding the Proposed Amendments to the Points of Claim, undated, but signed by counsel engaged and who conducted the case before the Court. The order of the Court will be for reliefs 1, 2 and 3 of the Defendant's Notice of Motion, dated 3rd January 2007.

I invite counsel to address the Court on reliefs 4 and 5 of such Notice of Motion.