

THE HIGH COURT

2008 6113 P

BETWEEN

CATHERINE (OTHERWISE KNOWN AS TRIONA) McNAMARA

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 26th day of May, 2009.**The proceedings**

The plaintiff in these proceedings is a Consultant Orthodontist, who is an employee of the defendant. She seeks permanent injunctive relief in various forms. The essence of the relief she claims is encapsulated in paragraph (a) of the indorsement of claim on the plenary summons, which issued on 25th July, 2008, in which she seeks an injunction restraining the defendant from refusing to permit her to resume her post as Consultant Orthodontist at St. James's Hospital. She also seeks damages.

Factual background

The plaintiff commenced her employment with the predecessor of the defendant, the Eastern Health Board, on 1st July, 1996, having by a letter dated 23rd March, 1996, to the Chief Executive of the Eastern Health Board indicated that she was prepared to accept an appointment in the capacity as Consultant Orthodontist under the Eastern Health Board subject to the qualifications and to the particulars of office approved by the Minister for Health for the office. The particulars of the office were set out in a three page document, which was accompanied by a one page document headed "Duties". Both documents were of general application and not personalised to the plaintiff. The provisions therein which are relevant to the issues of these proceedings are as follows:

(1) Clause 1, which made it clear that the plaintiff had the status of officer and would hold office under Part II of the Health Act 1970, and which also stipulated that the plaintiff would perform such duties as the Chief Executive Officer from time to time determined subject to any directions of the Minister for Health, referring to the one page document showing the "duties already assigned".

(2) Paragraph 1 of the "Duties" document, which provided (in part) as follows:

"To provide in person a consultant orthodontic service for eligible persons at such places and at such times as the Chief Executive Office may determine..."

(3) Paragraph 6 of the "Duties" document, which provided as follows:

"To perform, if required, duties similar to those above on behalf of or in any hospital or any health board or hospital authority which has entered into agreement with the Health Board for the use of his/her services".

When the plaintiff took up her duties with the Eastern Health Board she was located at St. James's Hospital in Dublin. She remained working at that location until the end of December, 2002. In the interim, the Eastern Health Board was dissolved on 29th February, 2000, and replaced by the Eastern Regional Health Authority (ERHA) and three new Area Health Boards with effect from 1st March, 2000. The plaintiff's employment was transferred to ERHA with effect from 1st March, 2000, and she was assigned to the South Western Area Health Board (SWAHB).

Disputes arose between the plaintiff and SWAHB which were the subject of judicial review proceedings in this Court on two occasions – in 2000 and in 2002/2003. The judicial review proceedings in 2000 (2000 No. 628 J.R.) were the subject of a judgment of Kearns J. delivered on 16th February, 2001. The judicial review proceedings in 2002/2003 (2002 No. 85 J.R.) (the 2002 proceedings), having been at hearing before Gilligan J. for a number of days in March and April 2003, were ultimately compromised on 9th April, 2003. The dispute between the parties with which these proceedings are concerned arises from that compromise and its consequences. From the point of view of formalities, the 2002 proceedings were struck out by the court with no order on 9th April, 2003. The compromise agreement was not reduced to writing.

At the time the 2002 proceedings were compromised the plaintiff was on special leave without pay for domestic purposes from 4th January, 2003, to 4th July, 2003 inclusive, because of an illness of a member of her family. To the extent that it is not in dispute, the basis of the compromise was that the plaintiff would take a career break from her position as a consultant orthodontist for a period of five years commencing on 7th July, 2003, which was the Monday after the special leave without pay would cease and each side would bear its/her own costs of the 2002 proceedings. The kernel of the dispute between the parties in these proceedings is whether the plaintiff was to take a career break "*simpliciter*" or unconditionally, as the plaintiff contends, or on the terms of various Department of Health circulars commencing with Circular S146/99 dated 16th March, 1984, as the defendant contends.

In any event, after the compromise the plaintiff remained on special leave and then commenced her career break on 7th July, 2003, for five years until 7th July, 2008. In the interim, from 1st January, 2005, the defendant took over the statutory functions formerly exercised by, *inter alia*, SWAHB. The plaintiff's employment was transferred from ERHA to the defendant and she became an employee of the defendant.

In anticipation of the cessation of her career break, the plaintiff, by letter dated 3rd April, 2008, advised the Chief Executive Officer of the defendant that she would "be resuming [her] post as consultant orthodontist, St. James's Hospital, Dublin" on 7th July, 2008. Following a reminder dated 6th June, 2008, the plaintiff was informed by letter dated 19th June, 2008, from the defendant's Acting Assistant Director of Human Resources for the Dublin Mid-Leinster region that no vacancy existed at the time in Dublin Mid-Leinster to facilitate her return from career break on 7th July, 2008. In the circumstances her career break was being extended for a further 12 months while efforts were being made to source a suitable vacancy for her.

That letter elicited the opening sally in these proceedings when, by letter of 14th July, 2008, the plaintiff's solicitors informed the defendant that it was not entitled to enforce the decision communicated by the letter of 19th June, 2008, which, it was alleged, was in clear breach of the plaintiff's contract and the defendant's own career break scheme. It was contended that the plaintiff was entitled to resume her duties forthwith at St. James's Hospital. Proceedings in this Court to compel the defendant to comply with its obligations to the plaintiff were threatened without further notice. The response of the defendant's solicitors, which was preceded by a holding letter, was contained in a letter of 22nd July, 2008, which adopted exactly the same position as had been adopted in the letter of 19th June, 2008.

Interlocutory application/course of proceedings

The plaintiff issued a motion seeking interlocutory relief contemporaneously with the plenary summons on 25th July, 2008. When the matter came before this Court (Sheehan J.) on 29th July, 2008, the interlocutory application was dealt with on the basis that the defendant undertook to restore the plaintiff's salary as and from 1st August, 2008, on the basis that the hearing of the substantive action would be expedited. The substantive action was listed for hearing on 10th February, 2009, but, due to a bereavement, it had to be re-listed. It eventually came on for hearing on 28th April, 2009.

In her statement of claim, which was delivered on 6th August, 2008, the plaintiff asserted, *inter alia*, as follows:

(a) that the purported extension of her career break for an additional period of 12 months was in breach of –

- (i) the express or implied terms of her contract of employment with the defendant,
- (ii) the compromise agreement reached on 9th April, 2003, and

(iii) the provisions of the Health Acts,

and was unlawful suspension without pay; and

(b) by reason of the unilateral decision of the defendant to impose an additional 12 months leave of absence on the plaintiff, she would be denied, *inter alia*, of the opportunity to maintain her important skills as a consultant orthodontist.

The defendant's defence, which was delivered on 12th August, 2008, was largely a traverse of the plaintiff's statement of claim. However, it was admitted that the 2002 proceedings were compromised and that it was a term of the compromise agreement that the plaintiff would take a career break, but it was asserted that the career break was pursuant to the terms of the defendant's career break scheme, which, as I have stated, is the kernel of the dispute between the parties. In the defendant's replies dated 20th November, 2008, to the plaintiff's notice for particulars, it was stated that the defendant would rely "on the provisions of Department of Health Circular 146/99" to illustrate the terms of career break schemes and it was stated that a copy of the circular was being furnished. What in fact was being furnished was a circular letter dated 26th August, 1987, from the Department of Health to the Chief Executive Officer of each Health Board, which varied the terms of circular S146/99.

Relevant factual matters post-commencement of the proceedings

At some stage prior to 25th August, 2008, the defendant offered the plaintiff a post of temporary Consultant Orthodontist in Kerry, which the plaintiff declined. By letter dated 25th August, 2008, the defendant, through its solicitors, informed the plaintiff, through her solicitors, that a Specialist Orthodontist vacancy existed in the defendant's Dublin Mid-Leinster area at Old County Road in Crumlin. This post entailed a reporting relationship to one of the Consultant Orthodontists in that region.

The plaintiff's position in relation to both offers was set out in her solicitor's letter of 24th September, 2008. As regards the Kerry position, it was stated that it was entirely unreasonable to expect a person who resides in Dublin to take up a position in Kerry. It was contended that the plaintiff was not under any obligation to take up a post outside her "contractual area". Further, it was stated that the plaintiff believed that no such temporary post existed, as she testified at the hearing. In relation to the Crumlin position, it was pointed out that the plaintiff's employment with the defendant is as a Consultant Orthodontist, not a Specialist Orthodontist, and that the offer was tantamount to a demotion and, accordingly, was unsuitable. The point was also made that Crumlin was a community clinic, whereas the plaintiff had always been a hospital based consultant in St. James's Hospital.

Later, in October 2008, the plaintiff's solicitors were informed that the defendant would not be indisposed to appointing the plaintiff to work in association with her brother, who is a Consultant Orthodontist in the Mid-West Area, that is to say, the Limerick area. Subsequently, following a meeting with her, in a memorandum of 13th November, 2008, addressed to her, the National Director of Human Resources with the defendant put two options to the plaintiff. The first was a renewal of the offer of the vacant Specialist post in Crumlin, on the basis that the plaintiff would continue to be remunerated as a Consultant Orthodontist, with the option of returning to St. James's Hospital if a suitable Consultant Orthodontist vacancy should occur in the future. It was made clear that, in the light of the appointment of a permanent Consultant Orthodontist at St. James's Hospital to replace the plaintiff, which, according to the defence, occurred in July 2005, a return to St. James's was not then available. The second option was the option of taking up an appointment to work in the Mid-West Area pending a suitable vacancy occurring in St. James's in the future. It is not clear from the documentation before the court whether there was any formal response to that letter.

The impending hearing of the substantive action on 10th February, 2009, obviously focused minds. By letter dated 10th February, 2009, the defendant's solicitors informed the plaintiff's solicitors that the defendant was making an offer of a permanent Consultant Orthodontist post at Limerick to the plaintiff. There was a formal response directly from the plaintiff to the National Director of Human Resources, by letter dated 12th February, 2009, in which the plaintiff stated that locating to a new post in Limerick was an impossible option for her. She also stated that she believed that the defendant

could justify the allocation of a new Consultant Orthodontist post to St. James's Hospital and simultaneously meet its contractual obligations to her. She made it clear that she was available for work immediately. Contemporaneously, in a letter of 13th February, 2009, the plaintiff's solicitors informed the defendant's solicitors that the plaintiff was entitled to be reinstated in her post in St. James's Hospital.

Scope of the proceedings

Arising out of questions posed by the court to the parties as to what these proceedings are about, and, in particular, whether they concern the plaintiff's position up to 7th July, 2009, only or her position thereafter into the future, given that the pleadings had effectively crystallised on 12th August, 2008, counsel for the defendant sought leave on the second day of the hearing to deliver an amended defence. Amendments of the defence, which were not objected to by counsel for the plaintiff, were allowed to cover the following pleas:

- (a) that the terms of the plaintiff's contract included the terms of various circulars from the Department of Health in relation to the career break scheme;
- (b) that the defendant specifically relied on paragraph 8 of the circular dated 26th August, 1987, a copy of which had been furnished with the replies dated 20th November, 2008, to the plaintiff's notice for particulars, but was erroneously represented as being a copy of circular 146/99; and
- (c) that the plaintiff had made three offers of redeployment to the plaintiff since July 2008, which offers had been rejected by her.

Paragraph 8 of the circular dated 26th August, 1987, was in the following terms:

"The provisions governing return to duty on the termination of a career break were outlined in this Department's letter of 27 Samhain, 1984. In the event that a suitable, fillable vacancy does not arise in the employing agency on the termination of the period of the career break, staff are guaranteed re-employment within the health service within 12 months of the date which had been notified to be the desired date of termination of the career break. The re-employment offered would not necessarily be in the same agency. Employing authorities should have regard to the position of staff on career breaks when assessing their requirements for the filling of essential vacancies, in accordance with the criteria specified by the Department. While every effort will be made to minimise the delay in permitting an officer to return to duty, and to accommodate his/her preferences where a return to the original employing agency is not possible, the guaranteed terms are as outlined earlier in this paragraph."

The issues

In my view, the issues which arise on these proceedings are as follows:

- (1) What were the terms of the compromise?
- (2) What consequences flowed from the combined effect of the terms of the plaintiff's contract and the terms of the compromise in relation to the expiry of the five year career break agreed on 9th April, 2003?
- (3) To what relief, if any, is the plaintiff entitled?

The terms of the compromise

Unfortunately, as I have recorded, the terms of the compromise were not reduced to writing and signed off on by the parties or their legal advisers on the day the agreement was reached, 9th April, 2003. However, the agreement was completed on that day when the proceedings were struck out by the court.

As I have already indicated, the kernel of the dispute between the plaintiff and the defendant on this issue is whether the compromise involved an agreement that the plaintiff would take a five year career break "*simpliciter*", or, alternatively, whether it was an agreement that the plaintiff would take a five year career break subject to the terms and conditions stipulated in the various circulars from the Department of Health governing the taking of career breaks.

By way of general observation, in my view, the terms of the departmental circulars making provision for career breaks were, as regards the plaintiff and any other officer, extra-contractual. However, if an officer decided to avail of a benefit provided for, he or she would only be entitled to do so on the basis of adherence to all of the terms and conditions governing that benefit at that time.

It is clear from the evidence of the plaintiff and of her solicitor, Carol Fawsitt, that their understanding was that the plaintiff was taking a career break for five years and at the expiration of the five year period she would return to her position as a Consultant Orthodontist based at St. James's Hospital. The negotiations which resulted in the compromise were conducted by the plaintiff's counsel, Roddy Horan, S.C., and the defendant's solicitor, Gary Byrne of the firm of BCM Hanby Wallace, both of whom testified. Mr. Horan's evidence was that the agreement which was reached was unconditional and that the plaintiff was going back to her post after five years. She was going back unconditionally after five years. There was no discussion about the possibility of the five years being extended to six years. Mr. Byrne had the benefit of a file note which he made on the afternoon of 9th April, 2003, after the 2002 proceedings were struck out by Gilligan J., by consent of the parties, at approximately twelve noon that day. Mr. Byrne recorded what he had agreed with Mr. Horan as follows:

"Dr. McNamara would take a five-year career break on the ending of her current period of compassionate leave which ends on 7th July, 2003, subject to the normal terms of the Career Break Scheme and she would complete the necessary documentation in that regard."

Mr. Byrne testified that that was what was agreed. When what had been recorded by Mr. Byrne in the file note was put

to Mr. Horan in cross-examination, he stated that Mr. Byrne may have said to him that the career break was on the usual terms. He simply could not remember. He was not going to contradict what was in the file note, because he could not remember.

It is necessary to consider what transpired subsequent to 9th April, 2003, in attempting to resolve the difference of understanding between Mr. Horan and Mr. Byrne as to what was agreed.

On 14th April, 2003, Ms. Fawsitt wrote to BCM Hanby Wallace referring to the settlement of the 2002 proceedings and confirming that "it was agreed that our client would take a career break from her position as Consultant Orthodontist based in St. James' Hospital for a period of five years commencing on the 7th of July, 2003". That letter crossed a letter from BCM Hanby Wallace to Ms. Fawsitt of the same date referring to the conclusion of the proceedings and enclosing form HR 14 for completion by the plaintiff "together with career break scheme details". Enclosed was the form HR 14 and two single page documents, one of which had the appearance of having emanated from the Department of Health, although not on departmental letter heading. It was headed "Department of Health Circular S/146/99 – 5th December, 1990" and "Career Breaks Scheme". The other, which obviously emanated from the Acting Personnel Officer of Eastern Health Board and was dated 2nd January, 1991, and was addressed to all heads of staff, was a résumé of the document dated 5th December, 1990. The plaintiff completed the form HR 14 on 7th May, 2003, and signed it. She also signed as "Head of Department" in the "Recommended by" section. The form duly completed and signed was returned by Ms. Fawsitt to BCM Hanby Wallace by letter dated 14th May, 2003.

That was the end of the regularisation of the compromise agreement from an administrative point of view.

Apart from the two documents which accompanied the letter dated 14th April, 2003, from BCM Hanby Wallace to the plaintiff's solicitor, the following documentation has been put before the court by the defendant in relation to the career break scheme, on the basis that it related to the scheme as it existed in April 2003:

- (1) a circular letter under the reference S146/99 dated 16th March, 1984, from the Department of Health to the Chief Executive Officer of each Health Board, which was headed "Special Leave Without Pay";
- (2) a circular letter bearing the reference S146/99 from the Department of Health to the Chief Executive Officer of each Health Board dated 27th November, 1984, which was headed "Special Leave Without Pay – Career Breaks";
- (3) a circular letter dated 26th August, 1987, bearing the reference S146/99 from the Department of Health to the Chief Executive Office of each Health Board, which is the circular which was referred to in the replies to the notice for particulars and paragraph 8 of which has been quoted earlier;
- (4) a circular letter dated 30th March, 1989, from the Department of Health to the Chief Executive Officer of each Health Board; and
- (5) a circular letter dated 7th November, 1990, bearing the reference S/146/99 from the Department of Health to the Chief Executive Officer of each Health Board headed "Career Break Scheme".

The document which accompanied the letter dated 14th April, 2003, which I have referred to earlier as having the appearance of having emanated from the Department of Health, is obviously a copy of the circular letter referred to at (5) above prepared in the Personnel Section of the Eastern Health Board on 5th December, 1990. The content of the document was obviously directed at employers, not at employees. Its purpose was to inform the employers of new rules for granting career breaks and for filling vacancies consequential on career breaks. It extended the scheme to include travel abroad as a purpose for which a career break might be granted, but made it clear that breaks could only be granted for domestic purposes, educational purposes or travel abroad. It also eased the then current position, which had mandated that consequential vacancies might not be filled on a permanent basis, and provided that an employing authority had authority to fill a vacancy on a permanent basis subject to certain criteria which were stipulated. The circular clarified the duration of "special leave with nominal pay" and the duration of a career break and stated that, in the event of a staff member seeking leave under both schemes successively, the maximum aggregated limit of five years should generally apply. It is clear from the circular that special leave with nominal pay was intended to facilitate staff who wished to take up short-term employment in countries whose health services were underdeveloped and, accordingly, had no application to the plaintiff's position in 2003. There was nothing in the circular which reiterated or referred to the entitlement of a health board to extend a career break for twelve months as provided for in clause 8 of the circular dated 26th August, 1987, which I have quoted earlier. Similarly, there was nothing in the document of 2nd January, 1991, which merely summarised the circular letter of 7th November, 1990 (not 5th December, 1990, as is suggested), in relation to the entitlement of a health board to extend a career break for twelve months.

Against that background I will now consider how the plaintiff completed the form HR 14. Under the heading "Eastern Health Shared Services" it referred to five distinct areas or operations. The South Western Area box was ticked and I assume it was ticked by the plaintiff. The form provided for two alternatives, one, (a), being an application for "a career break in accordance with circular dated 2nd January, 1991", and the other, (b), being an application for special leave without pay. The employee was invited to delete as appropriate. The plaintiff did not delete either and did not indicate in any way that she was making an application under either (a) or (b). However, further down the form, where the applicant was required to fill in the dates of, and the reason for, "Career Break/SLWOP", she crossed out "SLWOP", meaning "special leave without pay". She gave the dates of the career break as 7th July, 2003, to 7th July, 2008. In relation to the reason for the career break, she referred to the letter of 14th April, 2003, from Ms. Fawsitt to BCM Hanby Wallace to which I have referred earlier, a copy of which was attached to the form. Finally, she stated that she intended to resume duty on 7th July, 2008.

The section of the HR 14 form which was to be completed by a delegated officer was not completed. Therefore, in my view, it is reasonable to infer that the form was not processed in the usual way and that it was for administrative or record purposes only.

In my view, the conduct of the plaintiff and her solicitor after 9th April, 2003, is entirely consistent with their evidence of their understanding of what had been agreed between the parties when compromising the 2002 proceedings. There is

absolutely nothing in the completed form HR 14, or in the correspondence from Ms. Fawsitt at the time, which suggests that the plaintiff's position was that she was applying for a career break in accordance with the normal terms on which a career break could be granted at that time. On the contrary, care was taken to link the completed form to the letter of 14th April, 2003, from Ms. Fawsitt, which made it clear that the career break was being taken in settlement of the 2002 proceedings, not for any of the permitted reasons outlined in the documents which accompanied the form.

Insofar as there was a conflict between Mr. Horan and Mr. Byrne, I find that it arises from a misunderstanding between them as to what had been agreed, Mr. Horan believing that he had agreed that the plaintiff would take an unconditional five year career break, whereas Mr. Byrne understood it was to be subject to the normal terms of the career break scheme. Mr. Byrne's evidence was that, as far as he was concerned, the scheme in question was the scheme which was applicable to the plaintiff as an officer of a health board, the terms of which were ascertainable by reference to circulars. His view was that, unlike the position of, say, a private sector worker in a similar situation, it was not necessary to spell out all the terms. The problem with that is that the relevant personnel in the defendant's predecessor would appear not to have known that the terms of the scheme were regulated by the various circulars which the defendant has asserted in these proceedings. The form HR 14 incorrectly referred to a career break in accordance with "circular letter dated 2nd January, 1991". The document dated 2nd January, 1991, was not a circular; it was an in-house summary of the departmental circular dated 7th November, 1990, to the content of which it referred, but erroneously described as being dated 5th December, 1990. As the analysis of the two documents which were furnished to the plaintiff with the form HR 14 outlined earlier indicates, there was nothing in either document to indicate an entitlement on the part of the employer to unilaterally extend the duration of the career break for twelve months.

Even if clause 8 of the circular of the 26th August, 1987, continued in force until April 2003, and no evidence was adduced by the defendant to prove that, and even if the agreement was that the plaintiff would take a career break "on normal terms", as recorded by Mr. Byrne, in my view, the plaintiff could not have been bound by clause 8, which was never brought to her attention. I reject the submission made on behalf of the defendant that prudence would have dictated that she or her solicitor should seek more information in relation to circular S/146/99. In my view, the plaintiff and her solicitor would have been entitled to take the documents which accompanied the letter of 14th April, 2003, at face value as fully setting out the terms of the career break scheme by which she would be bound, when that was what was clearly and unequivocally represented by the letter from the defendant's solicitors.

Accordingly, I conclude that the terms of the compromise were that the plaintiff would be entitled to resume her position as a Consultant Orthodontist with her employer on the terms of her contract on 7th July, 2008. I find on the terms of the compromise that the defendant, as her employer, did not have the option of unilaterally extending the career break for a further twelve months from 7th July, 2008. Therefore, in purporting to do so, the defendant was in breach of contract.

Consequences

When the career break which the plaintiff had taken in compromise of the 2002 proceedings terminated on 6th July, 2008, she became entitled to resume her position as a Consultant Orthodontist on the terms of the contract which she entered into by accepting that appointment in 1996. From 7th July, 2008, she was entitled to be paid the salary appropriate to the position of Consultant Orthodontist and to all of the other benefits attributable to that position in accordance with her contract. From that date she was bound to perform the duties applicable to the position. Under the terms of her contract it is the Chief Executive Officer of her employer who determines the duties she is to perform at any particular time, subject to any directions of the Minister for Health. The terms of her contract make it quite clear that it is the Chief Executive Officer of her employer who is to determine where she is to provide orthodontic services to eligible persons. There is nothing in her contract which stipulates that she is entitled to provide services at the St. James's Hospital facility. Save to the extent that the nature of the services she is to provide indicates, there is nothing in her contract which stipulates that she is to perform her duties in a hospital rather than in, say, a community clinic.

While her contract expressly provides that it is the Chief Executive Officer of her employer who determines the duties she is required to perform and where she is required to perform them, it is obviously implicit in the contract that the duties are duties which are appropriate to the position of Consultant Orthodontist. If that involves professional autonomy, then the plaintiff is contractually entitled to exercise professional autonomy. Moreover, when the plaintiff entered into her contract of employment with the defendant's predecessor, it must have been in the contemplation of both contracting parties that the area in which she would be required to perform her duties was the functional area of the Eastern Health Board. In my view, merely because the functional area of the defendant extends to the entire State, it does not mean that the plaintiff is contractually bound to perform her duties in any regional area of the State as the Chief Executive Officer of the defendant may determine.

The plaintiff's claim has been advanced on the basis that she has a contractual entitlement to resume her position as a Consultant Orthodontist at St. James's Hospital and the relief she seeks has been framed on the basis that such a contractual right exists. It was submitted on her behalf that, until a direction is given that she is not to provide services at St. James's Hospital, she is entitled to continue to provide services at that locus. Insofar as the defendant may require her to work elsewhere, and it was submitted that that has not arisen, she is entitled to return to St. James's. Further, when a requirement that she change the locus of the performance of her duties is formally communicated to her, in accordance with the requirement of fair procedures, she can then make representations as to the decision to change her place of work.

My concern at this juncture is to ensure that, in granting relief to the plaintiff for the breach of contract on the part of the defendant which I have identified, the plaintiff's contractual entitlements are not overstated. It would overstate the plaintiff's contractual entitlement to formulate the relief on the basis that the plaintiff has a contractual right to resume her position at St. James's Hospital.

As Clarke J. stated in the penultimate paragraph of his judgment in *Cahill v. Dublin City University* [2007] E.L.R. 113 (at para 10.8), in a situation somewhat analogous to the situation which arises here, both sides must be reasonable: the employer is obliged to take reasonable steps to ensure that appropriate duties are assigned to the employee; and there is an equivalent obligation on the employee to be reasonable in the way in which he or she deals with such matters in all of the circumstances of the case.

As a matter of contract, in my view, the plaintiff is entitled to fulfil her role as Consultant Orthodontist in what is now the Dublin Mid-Leinster region. The defendant acted in breach of her contractual rights in offering a position to her on a temporary basis in Kerry and a permanent position in Limerick. On the other hand, the plaintiff has to face up to the

reality of the situation which the defendant and its predecessor faced and had to address, in providing orthodontic services in the functional area of SWAHB, when she decided to take a five year career break in 2003 and the consequences which flow from the decisions made subsequently. The most significant factor is that she was replaced at St. James's Hospital by a permanent Consultant Orthodontist. The plaintiff must act reasonably having regard to the changes which have taken place in the provision of orthodontic services in the Dublin Mid-Leinster area during the five year duration of her career break.

Having regard to her contractual rights, the relief to which the plaintiff is entitled at this juncture, in my view, must be founded on the entitlement of the plaintiff to resume her position as a Consultant Orthodontist with the defendant on the terms of her contract on 7th July, 2008, but without identifying the actual locus at which she may be required to provide orthodontic services. It would be regrettable, particularly in the current economic climate, if the locus cannot be agreed by the parties or determined by some process other than legal proceedings.

Relief

While the primary injunctive relief which the plaintiff has claimed is formulated as a prohibitory injunction, in effect, what the plaintiff is seeking is a mandatory order directing the defendant to permit the plaintiff to resume her post as a Consultant Orthodontist at St. James's Hospital. It will be clear from what I have said earlier, that I do not consider that the relief should be granted to the plaintiff in such a way as to recognise an entitlement on her part to perform her duties at St. James's Hospital. Aside from that, I do not think that a mandatory injunction is an appropriate form of relief in this case, in that it is tantamount to specific performance of an employment contract. For the reasons set out in my judgment in *Ahmed v. Health Service Executive* [2007] I.E.H.C. 312 in relation to the inappropriateness of a mandatory order to enforce a term of what is known as the Consultants' Common Contract, I think it inappropriate to grant injunctive relief in this case. However, I propose to grant declaratory relief to the plaintiff, which recognises the contractual entitlement of the plaintiff to resume her position as a Consultant Orthodontist with the defendant on the terms of her contract with effect from 7th July, 2008. I do so confident that the defendant, as a statutory body, will act in accordance with it.

In relation to the plaintiff's claim for damages, she is entitled to be paid her salary and any other emoluments with effect from 7th July, 2008. On the basis of an undertaking which I understand was being given on behalf of the defendant to pay the difference due in respect of the period between 7th July, 2008, and 1st August, 2008, in the event of the plaintiff being successful, I do not propose to make any order in relation to the relevant sums. There was no other evidence of special damage nor was there any evidence on the basis of which general damages could be awarded.

Order

There will be a declaration that the plaintiff is entitled to resume her position as a Consultant Orthodontist with the defendant on the terms of her contract with effect from 7th July, 2008.

THE HIGH COURT

2008 6113 P

CATHERINE (OTHERWISE KNOWN AS TRIONA) McNAMARA

AND

HEALTH SERVICE EXECUTIVE

This is an addendum to my judgment delivered on 26th May, 2009.

When the matter was before the court on 27th May, 2009, counsel for the plaintiff referred to page 19 of my judgment in which I stated that, in my view, as a matter of contract the plaintiff is entitled to fulfil her role as Consultant Orthodontist in what is now the Dublin Mid-Leinster region. I made that statement in the belief, which it transpires was erroneous, that the present Dublin Mid-Leinster region of the HSE corresponds with what was the functional area of the Eastern Health Board. Counsel for the defendant acknowledged that the belief was erroneous.

Accordingly, my judgment should be read on the basis that, as a matter of contract, in my view, the plaintiff is entitled to fulfil her role as Consultant Orthodontist in an area which corresponds to the former functional area of the Eastern Health Board.