

No. B2/2002/1489, Neutral Citation Number: [2002] EWCA Civ 1996

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRIDGEND COUNTY COURT
(Mr Recorder D Wyn Rees)

Royal Courts of Justice
Strand
London WC2

Thursday 14th November, 2002

B e f o r e:

LORD JUSTICE WARD,
LORD JUSTICE SCHIEMANN
AND
LORD JUSTICE LONGMORE

BETHAN HEALEY

Claimant/Appellant

– v –

BRIDGEND COUNTY BOROUGH COUNCIL

Defendant/Respondent

Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited
190 Fleet Street London EC4A 2AG
Tel: 020 7421 4040 Fax: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr T Kempster (instructed by the Legal Department, National Association of Head Teachers)
appeared on behalf of the Appellant Claimant.
Mr P Oldham (instructed by the County Solicitor, Bridgend County Borough Council) appeared on
behalf of the Respondent Defendant

J U D G M E N T
(As Approved by the Court)
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LORD JUSTICE WARD:

1. This is an appeal (brought with his permission) from the order of Mr Recorder D Wyn Rees made on 4th July 2002 in the Cardiff County Court, when he dismissed the appellant's claim for damages for wrongful dismissal from her post as head teacher of a primary school.
2. The facts giving rise to the claim can be shortly stated. The appellant, Mrs Healey, was employed as head teacher of Ysgol Gymraeg Bro Ogwr primary school by Bridgend County Borough Council, the respondent, from 1st January 1996. Her contract of employment included the provisions of the Conditions of Service for School Teachers in England and Wales (1985 edition), which are set out in what is commonly known as "the Burgundy Book". Among those conditions was a provision for sick pay to be paid for the first six months at full pay, followed by half pay for the next six months. Unfortunately for Mrs Healey, she became unwell through stress and depression and early in July 1999 she began a period of long-term sick leave. She was therefore entitled to be paid six months of salary and was so paid until, I would assume, 31st December. Her entitlement to half pay would have expired, as is common ground, on 30th June 2000.
3. Another benefit of that employment was her entitlement, under the Teachers' Pensions Regulations 1997, to payment of retirement benefits. In her case she would fall within Case C of regulation E4, which covered, first, a person who had not attained the age of 60 (which was her position as she was then only 51); secondly, a person who had ceased, before attaining the age of 60, to be in pensionable employment, as that has to be understood in the Regulations; and thirdly, a person who had become incapacitated before attaining the age of 60. She also had to show that she was not in Case D and that the Secretary of State was not exercising any powers which seem to relate to misconduct (which is, of course, nowhere alleged against Mrs Healey). "Incapacitated" is defined in the glossary to mean, in the case of a teacher, one who is:

"... unfit by reason of illness or injury and despite appropriate medical treatment unable to serve as [a teacher] and is likely permanently to be so."
4. There was unchallenged evidence given by Mrs Healey that during the summer or early autumn of 1999 she, with her union representative, met with the Director of Education and Leisure of the local authority and it was agreed at that meeting that Mrs Healey would make an application for ill health retirement benefits. That she duly did in January 2000. To do so she had to complete Form 18 of the Teachers' Pension Scheme. A difficulty has arisen (which is not insurmountable) in that at the trial before the recorder the actual form completed by her was not available to the court. The recorder therefore proceeded, as he was invited to proceed, on the 2001 form, assuming they were similar. We now have the completed form and there is a difference between them. It is agreed that we should deal with the form as actually submitted to the Teachers' Pensions supervising body.
5. That form required Part A to be completed by the applicant. It required personal details and it included, as question 14, "Last day of employment". To that Mrs Healey replied, "02.07.99". It seems to be fairly obvious (and there is no difference between counsel about it) that that was stated by Mrs Healey as being the last day of her active employment: that is to say, the time when she went off on this long illness from which, sadly, she has not recovered. The form had to be signed by her and it included declarations, inter alia, as follows:

"— I will inform Teachers' Pensions of any changes to my retirement date or any other details I have provided on the form.

- I will inform Customer Direct Pensioner Section of Teachers' Pensions if I begin employment in education at any time during my retirement.
- All the information I have given on the form is true to the best of my knowledge and belief."

It was a curious declaration to invite her to make because, as far as we can tell, no retirement date is specified on the form at all. The employer gives his certificate – it was signed by Mr Davies, the personnel officer – that "this teacher is retiring on grounds of ill health". Then it sets out also, as part of the employers' section of the form, details of the sick leave which the applicant was enjoying.

6. Having completed her part of the form, Mrs Healey wrote to Mr Davies in these terms:

"Please could you fill in the relevant information on the enclosed form. My GP has already received the form for his attention.

At the moment it is the Director only that is aware of my decision. I would be very grateful in your usual professional manner that this information be kept confidential until such time.

I feel so sad that the accumulation of problems has had such an adverse effect on my health. Indeed some of them are unnecessary because of misinterpretations.

Thank you for your support and guidance."

She enclosed a further medical certificate to cover her continuing absence from work.

7. In her evidence Mrs Healey stated that the decision to which she referred in that letter was her decision to retire on the grounds of ill health. That decision could only have been conveyed to the director at the meeting in the summer or late autumn.
8. In due time, on 13th June, Teachers' Pensions wrote to the local authority to confirm that the application had been accepted on the basis that Mrs Healey was considered to be unfit for teaching. The letter stated that:

"The benefits are payable on the day following the last day of pensionable service which will be either: the day following their last day of paid sick leave, any absences on paid sick leave will count as pensionable service and contributions should be collected as normal; or, if still teaching, the last day of pensionable service.

You should arrange for active teaching to cease with immediate effect and for employment to be terminated at the earliest possible retirement date.

I should be grateful if you would confirm the last day of paid service as soon as possible by completing [another form]."

9. They also wrote to the claimant confirming again that she had been judged eligible for a pension and lump sum on the grounds of illness. They wrote:

"Your application to retire has been granted on the basis that you are now too ill to continue teaching. If you are still in pensionable service, you should arrange for the earliest possible retirement date to be agreed with your

employer.

Your employer will be informed of our decision shortly and when we receive the necessary information from them we will be in a position to calculate your award of benefits."

10. The judge recorded in his judgment what happened then. He said at paragraph 12:

"Mr Davies states that, on receipt of the letter from TP [Teachers' Pensions], he tried to contact the claimant by telephone on a number of occasions but failed to make contact with her. The claimant acknowledges that, on 15 June 2000, she was given a message that Mr Davies had telephoned her but she states that, at the time, she was on very strong medication and in such a state that she did not return his call. Mr Davies stated that his purpose in contacting the claimant was to discuss the retirement date with her, to inform her that her last day of pensionable service was 30 June 2000 and that her pension was available from 1 July 2000. Mr Davies further stated that he was required to inform TP of the claimant's last day of paid service, which was 30 June 2000. Having failed to make contact with the claimant and, having regard to the imminence of 30 June and his concern that the claimant should not be without income after that date, he proceeded to notify TP that the last day of paid service was 30 June 2000."

11. On 7th July Mr Davies wrote to the claimant in these terms:

"I have received notification from the Teachers Pensions Agency that they have agreed to release your pension and lump sum based on the fact that it is considered that you are medically unfit for teaching. You will be aware, from the letter which you have received from the Teachers Benefits Agency, that the benefits are payable to you from the day following the last day of pensionable service which is 30 June 2000.

I have to confirm, therefore, that the Teachers Pensions Agency have been advised that your last day of paid sick leave was 30 June 2000 and accordingly, your contract of employment with this authority ended on that date by reason of your retirement on grounds of ill health."

He added his thanks and his best wishes for her recovery.

12. The claimant said that as far as she was concerned she had not agreed a retirement date; she had not been asked to retire; she had not resigned from her employment or consented to its termination. Accordingly, she treated the letter of 7th July as a notice of termination of her employment and she sought damages accordingly. Under the terms of service set out in the Burgundy Book she would at that stage have been entitled to four months' notice. That period of notice would, pursuant to the terms of the Burgundy Book, have expired on 31st December. Accordingly, she claimed as her damages the loss of her salary for that period (£14,405) and the loss of her pension contributions (another £1,310), a total of £15,715.

13. The recorder dismissed that claim. He gave his reasons as follows:

"(3)The Oxford Dictionary defines 'retire' as meaning:

'cease from or give up office or profession or employment'

It follows that the claimant's decision to retire on the grounds of ill health was a decision to cease or give up her employment on those grounds and that 'ill health retirement benefits' are benefits paid to a person who ceases or gives up employment on the grounds of ill health.

Accordingly, I am satisfied that, in informing the defendant of her decision to retire and to apply for ill health retirement benefits, the claimant was impliedly agreeing to retire from her employment upon her becoming entitled to payment of such benefits. ...

(5)Because a successful application for ill health retirement benefits involves a determination that the applicant has been found to be permanently unfit for teaching on the grounds of ill health, it follows that retirement should take place on the earliest possible date.

In this case the medical evidence obtained by TP showed that the claimant was unfit to teach through illness. ...

(8)... Accordingly, on receipt of the letter of 13 June 2000 from TP, the defendant was under no contractual obligation to serve a notice of termination of employment upon the claimant. No such notice was served on or before 30 June 2000 and I do not consider that the defendant's letter to the claimant of 7 July 2000 constituted such a notice.

(9)I am satisfied, therefore, on the evidence, that there was an implied agreement between the claimant and defendant that the claimant's employment would end through retirement upon the claimant becoming entitled to payment of ill health retirement benefits. It follows, from the above, that I hold the claimant's employment with the defendant came to an end through retirement on 30 June 2000."

14. Mr Kempster, for whose submissions I am grateful, submits that the recorder was in error in finding as he did in paragraph (3) of his judgment that there was an implied agreement to retire. He submits that there is jurisprudentially no such creature as an implied agreement and there either is an agreement or there is not. If there is, terms may be implied into it. I am prepared to assume that he is correct and to assume that ordinarily one needs to find an offer and an unconditional acceptance of that offer; and I am prepared to assume that one cannot exactly spell that out from these facts.
15. But Mr Oldham, who appears for the respondent, submits that the judgment should be held upon an alternative ground: that this should be viewed as a case where the employee resigned. Resignation is a unilateral act. It takes effect to terminate the contract of employment in a manner similar to giving notice to terminate. The events should be construed in that light. Mr Kempster submits that the employee would be bound to give the equivalent notice, as the employer is bound to do, which would be three or four months' notice, depending upon the term in which the resignation is to take effect; but, of course, that period can be waived by the employer.
16. It seems to me to be plain (and it is agreed) that at the meeting with the director it was not only agreed that the appellant would be applying for ill health retirement, but that she must at that meeting, as I have explained, have conveyed to the director a decision, as she said, to retire on the grounds of ill health. That must, in my judgment, amount to a notice of resignation. It of course leaves open the question whether or not that was unconditional, and in my judgment the real heart of this case is to determine what, if any, implications can be

drawn from the bald facts as they then were.

17. In order to apply for early ill health retirement, the appellant had to satisfy the requirements of Case C and, in particular, she had to show that she had ceased to be in pensionable employment. That is defined in regulation B4 of the Regulations, which puts it negatively as follows:

"A person is not in pensionable employment unless he is –...

(b)entitled to be paid his salary in full, or on sick leave and entitled to be paid not less than half his salary ..."

Because she was ill and absent from work her contractual entitlement to be paid her salary in full had ceased. But she was asserting a permanent incapacity and it was not likely that she would be paid salary again. Thus she would cease to be in pensionable employment and could be inferred to be making her application on the basis of that. Her entitlement arose because her half sick pay had ceased or would be ceasing. That was known to happen on 30th June.

18. It is important, in my view, to observe that the appellant does not suggest that the director said anything at all in the meeting or that anybody else on the local authority's behalf said or did anything to amount to or to suggest any termination of her contract of employment by the employer. The discussion could only have been predicated upon her entitlement to benefit arising when she came off sick pay. Her letter of 10th January was entirely consistent with this. There had still been no suggestion of the employer terminating her contract. She was seeking the employer's necessary co-operation by completing its part of the form to achieve her purpose of obtaining her ill health retirement benefits.

(At this point the fire alarm sounded and the court was evacuated, being resumed after the short adjournment at 2.00pm)

LORD JUSTICE WARD:

19. The court having to be evacuated for a compulsory fire drill and having stood in the rain for so long, I have forgotten where I was in my ex tempore judgment. To summarise the position, I proceed, first, upon an assumption that Mr Kempster is correct in asserting that the recorder was wrong to find an implied agreement to retire. Secondly, I proceed, therefore, to examine Mr Oldham's alternative case: that the appellant's communicated decision to retire is to be treated (as I hold it can and should be treated) as a notice to retire. Thirdly, the question is whether, as Mr Kempster contends, this is no more than a statement of future intention to retire, which is too vague and not specific enough as to the timing and mechanics of termination to have legal effect, or whether, as Mr Oldham contends, it must be read as subject to terms implied into it that she will retire if and when her retirement benefits become payable. A fourth point to make is that there has been no suggestion on Mrs Healey's behalf that the employer at any time, at least until the letter of 7th July, said anything capable of amounting to notice on its part to terminate this employment. I must proceed on the basis, subject to that argument about the effect of the July letter, that, if the employment terminated at all, it terminated by reason of the appellant's resignation, not by reason of any act on the employer's part.
20. I accept Mr Kempster's submission that a cessation of pensionable employment within the meaning of the Regulations is not the same as cessation of employment per se. The contract could, therefore, linger in limbo with no work being done and no salary being paid until either the employer or the employee terminated it one way or another. There would be a

considerable constraint on the employer giving notice to terminate in circumstances where the employee is ill. Condition 9.1.6 of the Conditions of Service in the Burgundy Book provides that:

"In the event of a teacher exhausting in part or full his/her entitlements under 9.1.1 above [which deals with the payment of sick pay] and being given notice of the termination of his/her contract without returning to work, on the ground of permanent incapacity or for some other reason, he/she shall be paid full salary for the notice period with normal deductions only."

The period of notice is three months expiring at the end of the school term or four months in the summer term.

21. We have been referred to a case which was heard by Mr Justice Patten, Dorling v Sheffield City Council and the Governing Body of Woodthorpe Primary School (unreported, 14th December 2001). Its sequel apparently has been that the Administrative Court has been moved by Mr Dorling, a teacher who fell ill, to force the local authority employer to give him notice under condition 9.1.6. It may be that he has been successful. Mr Kempster, who is the source of the information, believes that he may have been. But whether or not there is some other statutory regulation which would compel an employer to give the ill employee notice and the bonus of another three or four months of full pay, or whether there is no such obligation on the employer, does not matter for present purposes in this case. Either the employment terminated because of the resignation or it terminated because of unfair dismissal.
22. So I return to the primary question: is this an effective resignation? I reject the primary submission of Mr Kempster that it was a mere expression of future intention. It was much more than that. Mrs Healey knew that she would not be returning to work. That was implicit in her assertion that she was permanently incapacitated. She knew that she would cease to be paid sick pay on 30th June. She would be without income thereafter. If successful in her claim for retirement on health grounds, she would receive about the same amount, we are told, as the half pay sick pay that she was receiving, in addition, of course, to a lump sum of about £49,000. An objective consideration of the communicated decision to retire, treated as a notice to retire, would carry with it the implication that it was to be effective only if the application for benefit was successful. That condition has been fulfilled.
23. In my judgment the other implication which ineluctably arises from the facts is that her retirement would become effective from the earliest moment that benefits become payable. She was doing two things: first, she was applying to a third party for these retirement benefits; but secondly, she was giving her employers notice of a decision to retire. If the officious bystander were to determine when that retirement would become effective, he would say, "When the benefits become available to her." He would not countenance a position that Mrs Healey was playing the Dorling waiting game of forcing the employer to dismiss her. The officious bystander would not imply into the notification of a decision to retire a term that she was giving a contractual period of notice. The decision was open-ended beyond the three months period contractually provided for.
24. Mr Kempster points to the fact that Mr Davies endeavoured to communicate with her on receipt of the letters from the Teachers' Pensions organisation in order to clarify quite when she wished that retirement to take effect. That does not, in my judgment, affect an objective construction of the arrangements. In any event, he was enquiring as to whether or not she wished an earlier date to prevail than the date that ordinarily would be expected to prevail – the date on which her sick pay ended. Not having received an answer, he wrote the letter of

7th July. In that letter he confirmed (as he had to, and as he accurately did) that the last day of sick leave was 30th June. He went on to say:

"... accordingly, your contract of employment with this authority ended on that date by reason of your retirement on grounds of ill health."

25. In my judgment that was a correct analysis of her notice to resign. It was certainly wholly inconsistent with any act of dismissal on his part. The claim depended upon that letter being construed as a wrongful summary dismissal. In my judgment it clearly was not that. Mrs Healey was willing to retire if and when she received her benefits. That is the proper construction to place upon her communications with her employer.
26. In the event, in my judgment her employment terminated by reason of that resignation on 30th June and the recorder was therefore correct to dismiss her claim for damages. I would dismiss the appeal accordingly.

LORD JUSTICE SCHIEMANN:

27. The appellant informed the defendants of her decision to retire on the ground of ill health. They did not object. In all the circumstances of the present case, the appellant was informing them that she would retire immediately after the date when her sick pay ceased and she became entitled to be paid ill health retirement benefits. I agree, therefore, that this appeal must be dismissed.

LORD JUSTICE LONGMORE:

28. I agree also and have nothing to add.

Order: appeal dismissed with costs summarily assessed at £4,400 inclusive of VAT.