CARPENDALE

1980 No. 9842P

120

THE HIGH COURT

BETWEEN:

THEODORA CARPENDALE

Plaintiff

.v.

MATTHEW BARRY AND OTHERS

Defendants

JUDGMENT of Barron, J., delivered the 15th day of DECEMBER 198

The plaintiff in this action is an assistant teacher at the Holy Angels Special School at Glenmaroon, Chapelizod, Dublin. She is now and has been at all times material to the issues in this action the longest serving assistant teacher in the school. In the month of June 1977, applications were invited by the Board of Management for the post of vice-principal which was to become vacant on the 30th June 1977. Applications were received from two teachers in the school, the plaintiff and Mrs. Mary Hewitt another assistant teacher in the school. Each of these candidates was interviewed by the Board

of Management on the 23rd June 1977. Following these interviews the Board decided to appoint Mrs. Hewitt to the post. Both candidates were notified by letters dated the 25th June and notification of the appointment was posted in the school on the 27th June. By letter dated the 29th June the Department of Education was notified of the appointment and asked to ratify the same. Notification that the Department had sanctioned the appointment was given to the Board of Management by letter dated the 7th July 1977.

The plaintiff was dissatisfied at the appointment of Mrs. Hewitt to the post of vice-principal. She had believed at all times that since she was the longest serving member of staff at the school that she would automatically be entitled to and be offered the post. This belief was based upon her understanding of an agreement entered into between the Catholic Primary School Managers Association and the Irish National Teachers' Organisation. The full text of the agreement is as follows:-

"Appointment of vice-principals and to posts of responsibility

> At a joint meeting of the standing committee of the Catholic Primary School Managers' Association, and representatives of the executive committee of the Irish National Teachers' Organisation on the 30th June 1972 the following principles for appointments to vice-principalships and posts of responsibility were agreed to. The standing committee of the C.P.S.M.A. undertook to bring these agreed principles to the notice of the

"managers.

1. Notice of a vacant vice-principalship or other post of responsibility shall be posted within the school together with a statement of the responsibility involved.

2. Suitability for the post shall be a condition for appointment.

3. Other things being equal, the applicant longest serving in the school shall be offered the post.

4. In the schools conducted by religious, where the principal is a religious, a lay-teacher, as the vacancy occurs, shall be appointed vice-principal, and the posts of responsibility allocated to religious and lay-teachers in accordance with the proportions which they constitute of the total teaching staff of the school.

5. In case of doubt or difficulty, or any anomaly, the issue should be settled by discussion between the manager, the principal teacher and the persons involved.

6. If this discussion fails to achieve agreement, the matter shall be submitted to a board of arbitration appointed by agreement by the C.P.S.M.A. and by the I.N.T.O.

7. An arbitration board shall be structured as follows:

(a) two representatives of C.P.S.M.A. and two representatives of I.N.T.O. shall be appointed by the respective parties at diocesan level in the case of C.P.S.M.A. and at district level in the case of I.N.T.O.:

(b) an independent experienced person agreed to by those representatives shall be appointed to act as chairman.

8. No written record or minutes of the arbitration proceedings shall be kept other than the agreed findings, or in the case of disagreement between members of the board, the finding of the chairman. The board shall have power to call witnesses, and to make arrangements to have evidence heard in camera if necessary Any expenses arising shall be shared by the parties involved.

9. The decision of the board, or where necessary, the chairman of the board, shall be final and binding on the parties involved.

10. In all cases the name of the appointee shall be anounced when the appointment has been sanctioned."

The plaintiff received notification of the appointment of Mrs. Hewitt on Monday the 27th June. The following day she asked to see Sister Frances who was the chairperson of the Board of Management.

She saw her and indicated that she was disputing the appointment of Mrs. Hewitt. The following day she saw Sister Frances together with Sister Gertrude, who was the principal of the school. Again she objected to the appointment of Mrs. Hewitt and again went through the history of earlier appointments. Both Sister Frances and Sister Gertrude informed her that she was not eligible for the position. They quoted Rule 75(5) of the Rules for National Schools. Both of them assured her that her suitability was not in question. On the 30th June a meeting was held during the lunch time break at which Sister Gertrude, Sister Frances, Mrs. Hewitt and the plaintiff attended Again the matter of the eligibility of the plaintiff was referred to at this meeting. Reference was also made to the fact that the length of service of Mrs. Hewitt as a trained teacher was considerably in excess of the length of service of the plaintiff as a trained teacher It was clear to the plaintiff at this meeting that the Board of Management did not intend to change its mind. Accordingly, she handed to Sister Frances a letter which she had written on the 28th June 1977 purporting to operate Clause 5 of the Agreement between the Catholic Primary Schools Managers Association and the Irish National

Teachers' Organisation reached on the 30th June 1972. The letter is as follows:-

"Dear Sister Frances,

Thank you for your letter of 25th June 1977. Regarding the decision of the Board of Management to appoint Mrs. Hewitt as successor to Mrs. Brophy as Vice-Principal; by agreement between the Catholic Primary School Managers' Association (C.P.S.M.A.) and the Conference of Convent Primary Schools (C.C.P.S.) on the one hand and the I.N.T.O. that in case of doubt or difficulty or any anomaly the issue should be settled by discussion between the manager and the principal teacher and the persons involved, I am appealing under this Rule and would be grateful if you could organise this discussion.

Yours respectfully

Theodora Carpendale"

No reply was received by the plaintiff to this letter. On the 13th September 1977 the executive officer of the Irish National Teachers' Organisation wrote to the Board of Management to the same effect. By letter dated the 19th September 1977 the Board replied to the effect that the meeting required in accordance with paragraph 5 had been held on the 30th June 1977 and that the discussion failed to achieve agreement. There was no reply to that letter. The plaintiff did, however, discuss this letter with Sister Frances. It was indicated to her that if she wanted anything brought up before the Board that this would be done. The plaintiff did not take up this offer. Nothing further was done by the plaintiff until May 1980. In that month she

raised the matter with Sister Patricia who is now the chairperson of the Board of Management. She had never raised the matter with Sister Patricia before this date. Sister Patricia suggested that the plaintiff should write to the Board of Management and on the 14th May 1980 the plaintiff and her husband wrote indicating that they would like a meeting with the Board. The Board replied by letter dated the 4th June 1980 requesting the plaintiff to set out the points that she wished to discuss with members of the Board. The Board indicated that on receipt of such information they would again consider the matter and advise whether or not a meeting would be held. The plaintiff did not reply to this letter. The next step taken by the plaintiff was the issue of the proceedings in this action.

At the close of the plaintiff's case, the defendants applied for a non suit. The evidence for the plaintiff was given honestly and fairly and I accept it as truthful evidence. In particular, the evidence of the plaintiff herself lacked the exaggeration which is all too frequent a feature of similar cases. Accordingly, I approach this application as being a submission that such evidence

and such inferences as may reasonably be taken from it do not establish a prima facie case in favour of the plaintiff.

The plaintiff's case is put upon two broad bases: (1) that she was entitled upon the proper construction of the C.P.S.M.A. agreement to be appointed; and (2) that the Board failed to follow fair procedures by failing to give her an opportunity to show that she was eligible for the appointment.

The submissions on her behalf presuppose that the C.P.S.M.A. agreement should in the circumstances of this case be treated as creating a contractual relationship between the parties. This is not conceded by the defendants, but since the evidence shows that they accepted its provisions, I accept the plaintiff's contention for the purpose of this application.

The Constitution of Boards of Management of National Schools and Rules of Procedure provide by Article 23(c) that appointments to the post of vice-principal, as also appointments to posts of responsibility, shall be a function of the Board of Management. The eligibility of appointees to such posts is dealt with in Schedule E of that Constitution under the heading "Eligibility" at paragraph (b).

The conditions for eligibility for appointment to the post of vice-principal depended upon the points range of the school in question. If these points did not exceed 749, then the conditions for eligibility were those specified at Rule 76(1) of the Rules for National Schools for eligibility for appointment as principal teacher of a school of less than 80 pupils. Otherwise the conditions for eligibility were those specified in Rule 76(5) of the same rules.

This provision in Schedule E requires a construction of chapter 11 of the Rules for National Schools and of Rule 76 in particular. This chapter of the Rules deals with eligibility for recognition rather than with appointment as such. Rule 75 indicates four classes of recognised teachers. Having regard to the Rules for eligibility for recognition of such classes contained in Rules 76 and 77, it would seem that no teacher was eligible for recognition unless he or she was a trained teacher. However, in practice, there appear to be many untrained teachers - the plaintiff was an untrained assistant teacher for many years - who are recognised or at least whose service is recognised. This is important in considering eligibility for

appointment to promotional posts.

Under Rule 76, the required service as a condition for appointment to the post of principal teacher increases in accordance with the size of the school. In all cases, the applicant must be a trained teacher. For the smallest school, there may have been a period of service as a teacher which has been satisfactory: Rule 76(1)(b). The implication from this paragraph is that the service referred to was before the probationary period, which would have been as an untrained teacher. For larger schools, depending upon their size, there must be three previous years of satisfactory service and at least five years service in all, or five previous years of satisfactory service and at least seven years service in all. The lesser of these periods of service is required by Rule 76(5) in the case of appointment as a vice-principal.

It is submitted by the defendants that the required period of satisfactory service must be as a trained teacher. They rely upon The State (Walsh) .v. Murphy, 1981, I.R. 275. In that case, a practising barrister of not less than ten years standing was held to be a barrister who had been in practice at least ten years. "Standing"

was taken to mean professional experience and not just a period of time since call. The reason for so construing the word "standing" does not apply in the present case; service whether as a trained or untrained teacher suggests the gaining of experience.

There is admittedly no definition of the word "service". The use of the word 'service' in two different situations, i.e. where it must be satisfactory and where it need not be so, suggests that the same meaning must be given to it in each case. However, Rule 76(6) seems to put the matter beyond doubt. Paragraph (a) indicates the service to be considered when reckoning service for the purpose of appointments. This includes service as an assistant or a trained junior assistant mistress, but not, under paragraph (b), as an untrained junior assistant mistress. This suggests that service as an assistant may be either as trained or untrained. In my view, the plaintiff as an untrained assistant teacher had sufficient servic of the kind necessary to be eligible for the appointment.

There were considerable differences in experience between the two applicants for the post. The appointee was some fifteen years older than the plaintiff. She had a better qualification than the

plaintiff and as regards service within the Rules she had been a trained teacher for some ten years longer than the plaintiff. Finally she held a grade A post of responsibility whereas the plaintiff held a grade B post of responsibility. The evidence shows that these posts of responsibility were created as a means of securing a promotion for teachers. It would seem to follow therefore that the appointee had obtained greater promotion than the plaintiff. All or any of these matters would have suggested that as between the two candidates their merits were not the same.

The role of the Court when asked to enquire into the exercise of a power is to ensure that the power as exercised is the power granted and that its exercise has been fair and in accordance with the principles of natural justice.

The procedure adopted in this case was to advertise for candidates. The two candidates were each brought to a selection interview and at a Board meeting an appointment was made. The plaintiff seeks to establish that her candidature was never properly considered because she was never regarded as being eligible. The submission on her behalf contains the innuendo that the question of eligibility was an

excuse made up to explain the failure to appoint the plaintiff whom the Board knew they were obliged to appoint under the terms of the C.P.S.M.A. agreement.

If it could have been shown that such was the case, then the appointment procedure would have been a sham and the appointment a nullity. There was no evidence whatsoever to support such an innuendo. The fact that this reason was given for the failure to appoint the plaintiff in the context of the present case does not establish that the procedure was a sham. There was more than sufficient evidence to show that Mrs. Hewitt was entitled to be appointed on her merits and this basis for the decision was essentially given to the plaintiff. The fact that the Board may have misconstrued the rules as to eligibility would not of itself be a ground for setting aside its decision.

In my view, the power of appointment was properly exercised. Even if it had not been, the delay in commencing proceedings has been so excessive and so extreme that in the exercise of my discretion I would have refused the plaintiff relief. In my view, this case is a far worse case from the point of view of the applicant for relief

than The State (Cussen) .v. Brennan 1981 I.R. 181.

As I have indicated, I intend to treat the C.P.S.M.A. agreement as constituting a legally enforceable contract between the parties. This agreement had two basic aims: (a) to consolidate the traditional practice of promotions in accordance with seniority; and (b) to obtain a satisfactory means of resolving disputes.

Neither in these aims nor in the agreement itself is there anything to suggest that appointments should not be carried out following a selection procedure. There is nothing to impose a contractual liability on the Board of Management to appoint a particular applicant. What there is, is a contractual obligation on the Board of Management to appoint in accordance with the terms of the agreement. If its decision is contested, then there is a contractual obligation to appoint in accordance with the findings of the Arbitration Board or its chairman, as the case may be.

The decision of the Arbitration Board or of its chairman arises either as part of the appointment process or as an appeal from the decision of the Board of Management. Whichever way its function is regarded, if the right to involve this Tribunal is not exercised, the

party in dispute cannot claim that the contract has been broken. This cannot occur unless the Board of Management refuses to accept the decision of the Arbitration Board or of its chairman, as the case may be.

In the present case, the plaintiff regarded the procedure contemplated by Clause 5 of the C.P.S.M.A. agreement as a right of appeal. This of itself is immaterial as is whether or not the discussion contemplated by the Clause was held. What is material is that the plaintiff at no stage prior to her receipt of notificatic of the decision to appoint Mrs. Hewitt indicated any objection to the procedure being adopted. Nor did she do so by her letter seeking to invoke the provisions of Clause 5 of the agreement. Her objection was to the appointment of Mrs. Hewitt. If she wished this appointment to be revoked, it was for her to ensure that the arbitration took place, if discussion did not achieve her purpose. Since she did not do so, she has failed to establish any breach of contract.

The plaintiff has failed to establish her case and it must be dismissed.

Henry Barron
14/12/83

Hy Barron