

STATE (McMahon)

THE HIGH COURT (STATE SIDE)

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BETWEEN/

THE STATE (AT THE PROSECUTION OF KEVIN McMAHON)

PROSECUTOR

AND

THE MINISTER FOR EDUCATION, BRENDAN SCULLY,  
BRID PERSSE, DAVID MACPHERSON, EAMONN Ó BRIAIN  
WILLIAM ANTHONY BREEN, MICHAEL KEATING, PATRICK  
DONEGAN, FATHER CHARLES O'SULLIVAN, FATHER MARTIN  
KENNY AND FATHER MICHAEL O'NEILL

RESPONDENTS

Judgment of Mr. Justice Barrington delivered the 21st day of  
December, 1985

The Prosecutor is a teacher. The first named Respondent is the Minister for Education and the remaining Respondents are the Board of Management of Pobalscoil Rosmini. Pobalscoil Rosmini is a community school catering for the sighted, the partially sighted and multiply handicapped.

The present dispute concerns the filling of a post of responsibility in that school. A post of responsibility is one in which a teacher, in consideration of undertaking extra administrative duties, receives increased remuneration. Holders of posts of responsibility are paid out of public funds. A new post of responsibility cannot be created without the consent of the Minister and the number of posts of responsibility in any school is related to the number of pupils attending that school.

In July, 1984 a teacher resigned from a post of responsibility

in Scoil Rosmini to take up a post in a different school. The Board of Management informed the Minister of the vacancy and added that the Board hoped to fill the vacancy in late November.

On the 13th December, 1984 a notice appeared on the staff Notice Board in the school inviting applicants to fill a B post of responsibility in the school.

Up to this stage Scoil Rosmini had been a day school only. But among the duties to be assigned to the new holder of the post of responsibility was the duty of organising "a community education programme to take place in the school during 1985/86 on one or two evenings per week". When these courses got going the holder of the post would also be required to attend at the school on one night per week. The notice also contained (or was amended to contain) the following paragraph:-

"The duties attached to the post may change in accordance with the special requirements of the school; when the occasion arises whereby the number of night students generate sufficient points for a B post allocation, the teacher holding the Community Education Officer post will be permitted to retain the night post if willing to continue in that capacity."

The wording of this paragraph is rather obscure but it appears to mean that if and when sufficient night students attend the school to justify the creation of an extra B post of responsibility the successful candidate will be given the choice of retaining the post now on offer or of accepting the new post.

Be that as it may a number of teachers in the school applied for the advertised post. The Board of Management appointed a selection committee to interview them. The selection committee

recommended the Prosecutor as the best qualified candidate. The Board of Management accepted this recommendation and sent the Prosecutor's name to the Minister for approval.

On the 28th of January, 1985 Father McCarthy, the Secretary of the Board of Management, wrote to the Prosecutor informing him that his application "for the vacant B post at the above school" had been successful subject to the approval of the Department of Education and offering him the Board's sincerest congratulations on his success.

It is proper to say that the Board has at all times adhered to the view that the Prosecutor is the candidate best suited to the post. No challenge has been made in these proceedings to Mr. McMahon's ability or his standing in his profession. Mr. O'Callanáin, who is the Principal Officer in the Department of Education dealing with this matter, was at pains to point out that the Minister was making no criticism of Mr. McMahon but suggested that the post of responsibility to which the Board had purported to appoint Mr. McMahon was a new post of responsibility which had not been approved by the Minister and that the Minister was not, therefore, in a position to approve Mr. McMahon's appointment to it.

To understand this contention it is necessary to say more about the background to the dispute. In the background is a union dispute between the Association of Secondary Teachers in Ireland and the Teachers' Union of Ireland. The Association of Secondary Teachers in Ireland took the view that the post of responsibility in the present case should be filled by seniority. The Teachers' Union of Ireland took the view that it should be filled on merit. The Board

of Management, after hearing representations from the two unions, decided on an appointment by merit. Both unions have members teaching in Scoil Rosmini. As a result of the Board's decision the Association of Secondary Teachers in Ireland instructed its members not to apply for the post. Consequently, all the applicants for the post (including the Prosecutor) were members of the Teachers' Union of Ireland. As a result A.S.T.I. organised a strike at the school and it seemed as though the entire school curriculum would be disrupted. As a condition of settling this strike the Board entered into an agreement with A.S.T.I. which proposed that the entire dispute be submitted to arbitration. Mr. McMahon, however, did not agree to this and no arbitrator was ever appointed. The Board maintain that they never departed from their position that Mr. McMahon was the candidate best suited for the post.

One of the problems about the present case is that there is no law specific to community schools or governing the appointment of teachers to posts of responsibility in them. There is not even a Deed of Trust governing the management of the school. All parties, however, are agreed that the school is in fact managed in accordance with the provisions of a Draft Deed of Trust which has been produced in evidence. The first schedule to this Draft Deed is described as "Instrument of Management" and provides, at paragraph 2, that -

"The Board shall be responsible for the government and direction of the school, subject to the provisions of the first and second schedules hereof."

The second schedule has a section entitled "Selection and Appointment of Staff".

Paragraph 7, sub-paragraph A, of this section reads as follows-

"7A (a) The teaching staff of the school shall comprise of (sic) the numbers and classifications decided by the Board from time to time, subject to the prior approval of the Minister.

(b) The qualifications for appointments to the teaching staff shall be such as are stipulated from time to time by the Minister. Where the Board is in doubt as to the validity of the qualifications of a candidate for appointment it shall submit the question for determination by the Minister.

(c) Save in relation to candidates for appointment nominated in accordance with the provisions of Clause 7 B the appointment of teaching staff shall conform to the following procedure -;

"(i) Applicants for a vacant post shall be sought by way of advertisement in the public press unless in a particular case the Minister decides with the concurrence of the Board that because of special circumstances this procedure may be departed from

(ii) The applications received for the vacant post shall be considered by the Board who shall forward them to a selection committee of five persons constituted from time to time and comprising two representatives of the religious authorities involved in the operation of the school, a representative of the Vocational Education Committee, the

Chief Executive Officer of the V.E.C or his nominee and an Inspector of the Department nominated by the Minister. The aforesaid members shall constitute the full composition of the selection committee. The minimum composition of the selection committee shall be three members. The selection committee must at all times include an Inspector of the Department nominated by the Minister. The Chairman shall be agreed by the persons aforesaid from among their own number.

- (iii) The selection committee shall draw up a short list from the applications received and shall interview the candidates on that short list.
- (iv) The selection committee shall thereafter place the candidates on the short list in order of merit and shall submit that list to the Board.
- (v) The Board shall have regard to the order of merit settled by the selection committee and shall make appointments in accordance therewith save where in any particular instance the Board shall consider there is good and sufficient reason for not making an appointment or for departing from the said order of merit in which event the Board shall submit the matter to the Minister for determination.

(vi) In the event of the Minister in agreement with the trustees introducing a scheme for the re-employment of teachers who may become redundant in a comprehensive or community school, all or some of the aforementioned conditions may be waived in regard to the employment of such teachers."

The provisions quoted appear to apply to the employment of new teachers by the school. What was involved in the present case was really the promotion of a teacher already employed in the school by appointing him to a post of responsibility. There was no rule specifically governing the making of such an appointment. Indeed it is doubtful whether it was necessary to get the formal approval of the Minister to such an appointment. Indeed, had the Board of Management accepted A.S.T.I.'s recommendation and made the appointment on the principle of seniority it is hard to see that any selection committee would have been necessary or that the formal approval of the Minister would have been required. However, in the absence of any specific procedure governing their approach to the making of the appointment the Board decided to follow the procedures set out in paragraph 7A of the second schedule as closely as practicable. The appointment was an internal appointment made from existing staff in the school and therefore the question of placing an advertisement in the public press did not arise. A notice or advertisement placed in the school was considered sufficient. But the Board set up a selection committee of the kind contemplated by paragraph 7A(c)(ii). An Inspector of the Department of Education nominated by the Minister sat on this selection committee. The selection

committee made its recommendation dated the 16th of January, 1985 in which they recommended that Kevin F. McMahon be appointed to the B post of responsibility "presently vacant" in Pobalscoil Rosmini. The Board of Management duly accepted the Interview Board's recommendation and sent Mr. McMahon's name forward to the Minister for approval.

There followed a long delay on the part of the Minister. I am satisfied that this delay was not unconnected with the inter-union dispute between A.S.T.I. and The Teachers' Union of Ireland. It may also have been connected with other litigation then pending before the High Court. But on the 20th of March, 1985 the Prosecutor's Solicitors wrote to the Minister complaining of the delay and asking her to sanction the appointment forthwith. On the 3rd of April, the Minister wrote back saying that the matter was "receiving attention". On the 29th of March, 1985 the Prosecutor's Solicitors wrote again saying that it was the clear duty of the Minister to sanction the appointment or to state her reasons for not doing so. On the 21st of May, 1985 the Minister wrote to the Prosecutor's Solicitor saying that she had conveyed her decision to the Board of Management of the school. On the same date the Minister wrote to the Board of Management a letter in the following terms-

"I am directed to refer to previous correspondence and discussions concerning the appointment of Mr. Kevin F. McMahon under your Board's approved scheme of posts of responsibility. As the post in question has not been authorised by the Department, it is regretted that the Department is not in a position to approve the proposed appointment."



I am satisfied that at all times the Minister was attempting to obtain a solution to what she regarded as an unfortunate dispute. To that end it would appear that Mr. O'Callanain had certain informal discussions with various parties to the dispute without committing his Minister to any firm line of action. Nevertheless, it does appear surprising that if the post to which the Board was purporting to appoint Mr. McMahon did not exist that the Minister should not have discovered the matter sooner. Mr. O'Callanain very fairly, and properly, admitted that if there had been no objection to Mr McMahon's appointment the Minister's approval would have been forthcoming as a matter of course. There was no defined method of filling B posts of responsibility. Provided therefore a Board of Management appeared to be acting fairly and provided there was no complaint against the appointment the Minister would be unlikely to raise difficulties. I have no doubt also that, in the present case, the Minister was concerned to keep the peace between the various interest groups and that the Minister would probably have accepted any reasonable compromise worked out between the parties which did not prejudice the public service.

Nevertheless, the reason for withholding approval to Mr. McMahon's appointment, to wit, that the post in question had not been authorised by the Department, does not appear to me to be a satisfactory one.

Firstly, if the post was not an approved post this matter should have been obvious to the Minister from the beginning and it should not have taken the Minister several months to make up his mind on the matter.

Secondly, if the post was not an approved post it is surprising that the Minister's representative should have sat on the interview board and signed the document recommending Mr. McMahon as the most suitable candidate for the post. At the interview Mr. McMahon was questioned about his availability for night work so that the Minister's representative on the interview board (who did not give evidence in this case) must have known that the Board of Management would expect the successful candidate to carry out some night duties.

Thirdly, it would appear that in vocational schools there is a strict separation between posts of responsibility which derive from the attendance of whole time day pupils and posts of responsibility which derive from the attendance of night or part-time students. The number of day time students cannot give rise to the creation of a night-time post of responsibility and vice versa. I am satisfied also, however, that there is no rule, directive or agreement governing the position in community schools. Miss Maureen Ganley, who is an Assistant General Secretary with the Teachers' Union of Ireland suggests, from enquiries made by her, that in Balally, Ballinteer, Greendale, Palmerstown, Portmarnock, Leixlip and Rathcoole Community Schools night posts were created which, at the time of their creation, were based on a points rating derived for the attendance of whole time day pupils.

Fourthly, it appears to me that Pobabscoil Rosmini was in a state of transition. It was a day school but was contemplating organising a night course and was making clear to the successful candidate for the vacant post of responsibility that it would expect him to accept responsibility for the organisation of the night course. But in the event of sufficient night students

attending the course to justify the creation of a further B post of responsibility the successful candidate would be given the choice of the night post or the day post.

Finally, it appears to me that at all time what the Board of Management was attempting to do was to fill the vacant B post of responsibility in the school. They may have attached new duties to that post but it is clear from their return to the Department, from their offer to Mr. McMahon and from the recommendation of the interview board that all parties thought they were filling the vacant B post of responsibility in the school and not creating a new one.

#### The Law

As previously stated there is no law specifically governing the running of community schools. The salaries of holders of B posts of responsibility in community schools are, however, paid for out of public funds administered by the Minister for Education and provided under the provisions of the Appropriation Act. Mrs. Robinson submits that these funds must, in the absence of legislation or published statutory conditions, be administered in accordance with some just or rational principle. She relies strongly on the decision of the Supreme Court in Latchford & Sons Limited .v The Minister for Industry and Commerce 1950 Irish Reports at page 33. That case concerned subsidies payable to bakers in certain circumstances by the Minister for Industry and Commerce. There was no legislation governing the method of payment of the subsidies. But the Minister had published certain conditions with which applicants had to comply in order to qualify for the subsidy. The Plaintiffs had complied with all the conditions but the Minister refused to pay the subsidy on the grounds that the Plaintiffs had been convicted of an offence

relating to the sale of bread. The published conditions did not contain any reference to a person, otherwise qualified, being disqualified because of such conviction. The Court accordingly made a declaration that the Minister was not entitled to withhold payment of the subsidy as punishment for, or otherwise on account of, the said conviction.

Mr. Justice Murnaghan, delivering the judgment of the Court, recited the relevant provisions of the Appropriation Act 1944 and proceeded as follows

"It is the duty of the Court to interpret this statute, and there seems to be little room for doubt as to its meaning. The subject-matter of subsidy, the amount of subsidy, and all the conditions under which subsidy may be granted are left to the discretion of the Minister for Supplies. This construction may be reached by the following reasoning. In the appropriation made above the amounts are not segregated, but it is clear that portion of the said sum is granted for the purpose of paying subsidies. If the Appropriation Act had prescribed the conditions under which persons would be entitled to such subsidies, a person who did in fact comply with the conditions prescribed by the Act would be entitled to some of the declarations sought in this case. Inasmuch as the Act itself has not prescribed the conditions, the Oireachtas has delegated to the Government, acting through the appropriate Minister and responsible to the Dáil, power to apply portion of the said sum in payment of such subsidies and to prescribe the conditions on which persons would be entitled to obtain subsidies.

"In the exercise of this delegated power the Minister for Supplies has prescribed the conditions in the notices he issued to bakers, including the plaintiff Company. The conditions made by the Minister for Supplies might have been so framed as to make it a condition of obtaining payment in any particular period that the claimant should not be convicted of any offence in connection with the sale of bread; or the conditions might expressly have made payment a matter absolutely within the discretion of the Minister; or a condition might have been stated giving the Minister power to withhold payment of subsidy in any case where there was a conviction in respect of an offence in connection with the sale of bread.

After having made and published the conditions on which payment of subsidy would be made, the Minister can alter these conditions from time to time or withdraw them: but, until altered or withdrawn, the conditions apply, and persons who have complied with the published conditions are entitled to claim that they have qualified for payment of subsidy."

Mrs. Robinson seeks to apply this reasoning by analogy to the system of appointment and selection of staff set out in paragraph (7) in the second schedule to the Draft Deed of Trust which in fact governs the running of this particular school. She submits that a candidate who had in fact gone through the selection procedure set out in paragraph (7), sub-paragraph (a) and been selected as the successful candidate would in fact be entitled to the appointment. Indeed, she goes further and submits that under the provisions of paragraph (7) the approval of the

Minister is not necessary for the present appointment and that therefore the Prosecutor, having been selected by the Board of Management as the best qualified candidate, is entitled to the appointment without reference to the Minister.

I cannot accept this reasoning in full. It may be that it was not necessary for the Board, in order to fill the vacant post in this case, to adopt the elaborate procedures which they did adopt. The Board, however, decided to proceed by close analogy to the provisions set out in paragraph (7) for appointing new staff. The procedure which they adopted may have been more elaborate than was strictly necessary. But it was a manifestly fair procedure and appears to have been accepted as such by all parties to these proceedings, including the Prosecutor and the Minister.

Under the procedure in fact adopted, Mr. McMahon has been selected as the best qualified candidate. The Minister has withheld approval of Mr. McMahon's appointment not because she questions Mr. McMahon's qualifications but because she took the view that the post to which the Board was purporting to appoint Mr. McMahon did not exist. In my view she was wrong in this decision and did not address her mind to the correct issue which is Mr. McMahon's suitability to fill the existing vacant post for which the Board has recommended him.

Under these circumstances it appears to me that the proper Order for this Court to make is an Order of Certiorari quashing the Minister's decision and an Order of Mandamus directing the Minister to consider in accordance with law the question of whether she should approve the appointment of Mr. McMahon to the post. I do not consider it appropriate or necessary to make any Order against the Board of the school. I will accordingly discharge so much of the Conditional Order as relates to it.

*Approved. DB.*

*23/11/86*

MARAH

33

Finlay C.J.  
Hederman J.  
McCarthy J.

THE SUPREME COURT

(255/261-84)

EDWARD ANTHONY MARAH  
AND CELINE MARY MARAH

Plaintiffs/  
Respondents

AND

T.C. GERARD O'MAHONY

Defendant/  
Appellant

JUDGMENT delivered on the 1st day of November 1985 by

MCCARTHY J. *nem. diss.*

By agreement for sale of the 17th July 1979, the defendant agreed to sell to the trustee for the plaintiffs a site at Nutley Avenue, Ballsbridge, Dublin, for the sum of £33,000, the property being stated to be "held by vendor in fee simple." Before completion of the sale, it transpired that there had been an assignment of the 27th August 1969 which along with a lease of the 13th August 1969 reduced the defendant's title to less than the fee simple. On foot of certain warranties and representations given and made by the defendant, the sale was completed on the 17th August 1979 by