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Judgment: approved by the Court for handing down | *Delivered:* **18/02/09**

(subject to editorial corrections)

In the County Court for the Division of Antrim

Between:

Stuart MacDonnell **Plaintiff**

And

Northern Area Health and Social Services Board **Defendant**

Delivered on 18th February 2009

His Honour Judge Smyth

1. Mr McKee appeared for the Plaintiff and Mr Devlin for the defendant. The court is grateful to both of them for their assistance and for their helpful written arguments.

2. The Plaintiff is Chief Executive of the Northern Health and Social Services Board and employed by the defendant as such since 29th July 1996. The letter offering him this post and its schedule form the plaintiff's contract of employment. This case concerns "Performance Related Pay" (PRP) which is dealt with by various circulars from the Department of Health and Social Services. These are expressly referred to in a letter from the Defendant Board dated 17th August 2001: "in addition to any annual pay awards, you will be eligible for increases under the arrangements for performance related pay set out in the relevant circulars."

3. The circulars and the history of PRP, certainly at first sight, appear to be complicated. It is also clear that various courts and tribunals have had to consider pay-related issues between the senior and general managers of Trusts and Boards and their employers. I only give a very limited history of this and, at this stage, confine myself to the concept, status and history of PRP from its introduction and as I find directly relevant to the questions I have to ask.

4. PRP was first introduced by Circular in 1989 but the Circular that directly concerns this case is that of 1/91 headed "Performance-Related Pay for

General and Senior Managers". The purpose (about which I will say something later) of PRP is stated in that Circular to be "to reward managers who achieve a more than competent standard of work" and, within five band definitions, the scheme is stated to be "designed to reward both short-term and long-term contribution to management". A manager's line manager is described as responsible for the initial assessment of performance with confirmation residing with the next line manager. They are described as "parent" and "grand-parent" respectively.

5. This provides a problem with the Chief Executive as the parent in this case will be the Board Chairman and the grand parent, somewhat confusingly, is also called Chief Executive but this I understand to mean the appropriate executive head in the Department of Health. The Plaintiff's employer is however the Defendant, albeit subject to control by Circulars from the Department. The effect of this is that the Plaintiff's grandparent, understandably given the Plaintiff's rank, is outside the Board and is a senior in the Department.

6. The importance of the role of a grandparent is high-lighted in paragraph 5 of the Circular. "The grandparent has the final say in the award of PRP and is responsible for seeing that the scheme operates **fairly** and **consistently** across **a wider** group of managers". This responsibility is therefore to ensure fairness and consistency across the managers. The highlighting is mine.

7. This case has been referred to as a "test case" by the Plaintiff but it still has to be treated on its merits as an individual case. While the result will clearly have an impact on all four other Chief Executives of Boards, who have been treated identically, none have brought proceedings and none of them are parties to this case. There has not been any agreement to treat this as a test case.

8. It is not disputed that the entitlement to be considered for PRP is to be regarded as a contractual obligation. A Tribunal case, Carson and others v Homefirst Community Trust, settled the question as to whether entitlement to be considered for PRP was a contractual entitlement. What is in dispute relates to the manner of that assessment and the rate of PRP to be applied.

9. There is no great dispute about the factual background. Mr MacDonnell became a "senior manager" of the Defendant on 3rd December 1990. The relevant Circular was 1/89 and this provided for a flat rate salary but no annual increments. Apparently these had been replaced in1989 by a system of PRP. In effect this meant there would no longer be automatic yearly increases. Instead performance was to be assessed and this, depending on how it was determined and its rate, would form part of the employee's salary in future years.

10. In July 1996 the Plaintiff was appointed Chief Executive, a general manager post. In 1991 the Circular 1/91 made significant changes. The first was that PRP would be awarded on a group basis. I think the best way of referring to this is that a kind of cap or limit was to be set within which PRP was to be determined for the Group, but as a percentage and not as a cash sum. On first sight the Circular set out a complicated scheme but that scheme clearly

envisaged that the object was to reward performance that exceeded broadly determined standards. Each manager in a relevant group would be assessed on a basis that was individual to him and that was both fair and consistent across whatever was meant by the words “a wider group of managers”.

11. Although it is discretionary, paragraph 12 gives the employing Authority power “to use a grouping wider than one’s grandparent’s span of responsibility” for such an assessment. Sensibly, the example is given that this might be considered where the size of the group covered by that grandparent is too small. I presume that a possible case is the grandparent, who has to make the ultimate decision, and who has to consider five Chief Executives. It allows for consideration, on a discretionary basis, of other groups so long as the separation between General and Senior managers is maintained and the increases are clearly within the limits allowed.

12. From the brief history of this as given to me, it seems that there was no need to give any attention to any members of the group of Senior Managers as, although there was some variation as to the banding into which the Plaintiff was placed, he was always given the same percentage increase of PRP as his fellows in the group. Although his evidence was not always clear on this it seems that all those members of his relevant group were treated identically on every occasion. PRP was in effect being used to provide a routine annual salary increase and had nothing to do with performance. The, quite elaborate, scheme drawn up in the Circulars was not being operated in accordance with either the letter or with the spirit of the Circulars.

13. When the Plaintiff was a Senior Manager (i.e. before he was promoted Chief Executive and became a General Manager) he, in common with all members of that group, received without fail the maximum limit of 2.7%. After he was appointed Chief Executive he, and the other four in his group, received 3.6%. This was done on a consistent basis and for so long that it is clear there was no attempt being made to operate the expressed intention and the spirit of the Circulars, namely to make individual determinations and reward performance on the basis listed. They were in effect being used to give salary pay rises unrelated to anything to do with performance so long as an individual did not fall into the lowest categories which they never did. There was a very minor exception of .01% in one year.

14. In 2001 the Plaintiff was offered another contract of employment but decided to remain on his existing contract. Since 2001 a number of Circulars have been issued. To avoid prolixity in explaining these I summarise the position. Names have changed a little but this I ignore. Chief Executives were awarded 2.9%, then 1.9%, and then 2.275%. Subsequent years have seen the award of limits of 2.0% , again without discrimination between members within the group of Chief Executives. The awards to Senior Managers have not altered and I have not sought reasons for this distinction. That is not relevant to what I have to decide and I have not been offered them. For Senior Managers the rate has been 2.7% since 1991.This has not altered.

15. The Plaintiff feels aggrieved. The manner in which the Circulars were being operated was to use the PRP to give an increase which became a part of the salary for the following year. The decisions on limits since 2001 effectively means that the Plaintiff has been facing what he regards as a salary cut. It is correct to say that the margin of 3.6% would have had the effect of creating a cumulatively wider annual gap between the two groups of managers, General and Senior. Of course the opposite is now occurring. Again, I feel that is not something I should have regard to. If his PRP had not been altered in rate his salary would have been appreciably more.

16. Through Mr McKee, the Plaintiff argues that he is not only entitled to be assessed for PRP as part of his terms and conditions of contract but that, despite the inclusion of words in the Circulars "that there is no automatic entitlement to the maximum increases for the performance banding awarded", not only the entitlement to be assessed for PRP is part of his terms and conditions of employment, but that the Plaintiff's employer has done precisely what the express words in the Circulars said was not to be the case. The relevant groups received, for so long a period, the maximum increase within the limits permitted , without any variation or discrimination, (see the examples given in the appendix to Circular 1/91) that, whatever was said in the Circular to the contrary, this had become an entitlement. This was either by a term that was to be implied or by custom and practice, having regard to the course of conduct of the parties.

17. What has happened since 2001 therefore is a unilateral variation of his terms and conditions of appointment. Either the rate of 3.6% was, despite being described as a limit, expressly part of his contract or there was an implied term to this effect. The court should look at the contract, without literalism, but with regard to its history and to the consistency of the award, and the reasons for its introduction which was to replace an annual increment system. If it is not an express term, it should be implied that the annual group limit should be awarded, without discrimination, to all managers whose performance is banded at group three and above. The rate set for General Managers has been 3.6% and that for Senior Managers 2.7%. This should be implied either on the ground that it had become custom and practice and/or because of the course of dealing between the parties. The force of this was greater when regard was had to the effect on a subsequent year's salary. In other words the PRP then had become a part of the annual salary.

18. I do not need to concern myself with whether this is an express term. In my view it is not.

19. In itself the existence of an apparent unfairness between groups, the basis for which is not clear, is not a consideration for this court. Certainly, it is possible to read the words in paragraph 5 of 1/91 as requiring the application of fairness and consistency across a group that was wider than that which purely contained the Plaintiff. If that was so then this requirement could perhaps be held to have become part of the terms and conditions of the Plaintiff's contract of employment. This is however ambiguous and I believe I should determine this matter on the issues raised by Counsel.

20. Neither Mr Devlin nor Mr McKee disagrees about what is required to establish "custom and practice". The term must be reasonable. It must be "notorious" i.e. very well known and it must be certain. These tests are set out in Henry and Others v London General Transport Services Ltd (2001) IRLR 132, a decision of the Employment Appeal Tribunal. Mr McKee says that all these tests can be applied to the above facts. The percentage has been consistently applied, albeit not in keeping with the spirit of PRP, but it has not been varied. It has been applied for so long that any reasonable observer would say it has become part of the annual salary round. It is well known to all involved, despite whatever wording is used. The course of dealing between the parties should be looked at in the light that a very limited number of persons were affected since 2001 namely those general managers who did not accept the new contracts offered in 2001, and the also the prior history of the change from annual increments to PRP. The Department does make a "Salary Review Uplift" and for the new Senior Executives in January 2007 this was 2.5% but this is a separate matter.

21. Mr Devlin counters that the decisions taken are well within the clear discretion given by the Circulars of the **Department** to the **Board**. He argues that it does not matter that Senior Managers' PRP rates have not been altered since it is perfectly within the ambit of the Department's discretion and clearly within the wording of the Circular. The Department could, but did not, alter the rates of PRP for Senior Managers but chose not to. That was well within its responsibilities under the Circular. I do not here set out all Mr Devlin's contentions they are listed in his written arguments. He accepted the entitlement to assessment of PRP was a matter of contract but contended that the rate and limits were not.

22. Mr Devlin in his written submissions marshalled cogent arguments against the court accepting that any custom and practice had developed as a result of the Plaintiff being paid PRP at the maximum level of the "group limit" so long as his performance fell into Band 3. I summarise these in brief:

    - For the court to accept this argument would mean that custom and practice is, in this case, taking precedence over the expressly stated terms of the Circular which included these words, "As at present there is no automatic entitlement to the maximum increase for the banding awarded; the precise amount is at the discretion of the parent and grandparent. The band limits are set out in full in paragraph 6 of Annex 1" He refers to London Export v Jubilee Coffee (1958) 2 AER. 411.

    - If the court accepts the Plaintiff's argument this would have the effect of turning what is a **group limit** into an **entitlement** (my emphasis). This limit, however it has come into origin and been operated, was never intended to be and cannot be an annual percentage entitlement. The entitlement, as determined by the Tribunal in Carson and Others, is only to assessment for PRP not what the annual percentage PRP will be.

- Such a custom and practice could never be regarded as reasonable as it would so obviously run counter to the spirit of the Circular as well as being in contradiction of its expressed terms and aims.

- Certainty could not be achieved as the operation of the custom and practice as contended for by the Plaintiff leaves uncertainties such as those reflected in the Plaintiff's Replies to Particulars. Its precise terms were too vague and its scope vis-à-vis all the managers are too uncertain.

- A practice cannot be acquired in such a short period, despite whatever is said about its consistency and the manner in which it is operated over that period. Here one is talking about 8 years with a one year gap when 3.5% was (for some reason) awarded. As an example of the lack of "notoriety" of the alleged custom and practice there was the inability of the Plaintiff to know precisely what other managers received. (I was however of the opinion that all managers expected such an award). No other manager was called to say either what he received or what he expected to receive.

- In particular Mr Devlin said that, as a matter of law, the Department was entitled to apply the reduction across the board (in this case meaning uniformly across managers). The Department chose not to do so but it was not for the court to challenge or investigate the reasons for this. Quite simply put, it was in keeping with the clear wording of the Circular and consistency or otherwise was not a matter for the court. The court should simply have regard to the literal terms of the Circular. In particular the reliance placed by Mr McKee on the discussion of literalism in Millar v Northern Ireland Office (NIQB 2007/12) was misplaced and not apt.

23. I have looked at the argument as to whether the terms that Mr McKee says should be regarded as implied and I regret I cannot accept them in isolation from his arguments in relation to custom and practice (when those are viewed in the light of the course of conduct of the parties). It is impossible to avoid concluding that the Circular 1/91 has not been applied in keeping with either its spirit or with the letter of its terms. What has been the case, for sufficiently long a period as to constitute a practice, is that the employer has ignored the purpose of the Circular. A Circular whose purpose was to reward performance was not used for that purpose. There can be no other explanation for the consistency of the award of maximum percentage increases "across the board" i.e. to all managers.

24. Has this created, can this ever create, a "custom and practise" namely an action that is in contradiction of the precise terms of a Circular and with its spirit and stated objects? The court has had difficulty with this. I use the word difficulty because I do not believe that there has been fairness or consistency between the way General Managers and Senior Managers are being treated. I however feel that the court's feelings that a PRP system has not been used

properly and appears to have been used in a discriminatory way to give automatic increments to certain groups of employees does not in itself permit this court to intervene. It can only do so if the Plaintiff establishes that what has happened has established a custom and practice that has the three requirements of reasonableness, certainty and notoriety.

25. The easiest matter to answer is whether the eight/nine years, in itself, is sufficiently long. In my view this has to be viewed on the facts, the history, the conduct of the parties and their actual understanding and reasons offered for acting the way they did. I am of the view that the consistency of the award between groups and the period of time over which this consistency applied is sufficiently long to constitute a practice.

26. Is such a practice reasonable? Can it ever be reasonable to regard a custom and practice as having arisen that is in contradiction of both the express wording and the spirit of a Circular? I think the answer depends on what the views of an informed person sitting and examining all the circumstances, including the course of dealing between the employer and the employee, are. In my view the Plaintiff's contentions when so viewed, given the history I have listed above, are reasonable. For this period of time his employer chose to apply the PRP in a certain way that was bound to lead to expectations and did. What has happened has been that there has been a very partial attempt by the Department to correct this.

27. Is there "certainty"? The figures are not in any dispute. The custom and practice had become established that the figures would be used not to reward performance but on the basis that the award would, despite what was said in the Circular, be automatic up to the limit set. It may be that the manner of awarding PRP should be changed but it should be changed in a way that is not arbitrary and discriminatory and affects only one group but affects all groups equally. This is the duty of the Board as employer. I do not see there being uncertainty in the figures.

28. Is the practice sufficiently well known, i.e. "notorious"? I accept Mr Devlin's comments about the absence of other managers as witnesses but I have formed the strongest view, in particular having regard to the way Senior managers remained unaffected, that everyone in a managerial position with the Defendant Board had a clear expectation that these awards would be automatic and not subject to arbitrary reduction in the way they have been.

29. I have referred to the wording of paragraph 5 and the principle of the grandparent achieving fairness and consistency. That has not happened here. It is part of the Plaintiff's contract that he is entitled to PRP assessed in accordance with Circular 1/91 it also should be for his grandparent, here the Department, to ensure that there is fairness and consistency between managers. This they have not done. They have applied a reducing percentage limit to their grandchildren knowing that there are only five of them and that they do not perform the function of grandparent for Senior Managers. That however is, as I have said above, incidental to my finding.

30. I hold that, by custom and practice, for so long as the Plaintiff is placed in band three or above, he is entitled to payment of PRP at the maximum level of the group PRP limit, without there being an arbitrary reduction. This is for so long as there is a failure by the Board, the Plaintiff's employers, to apply the Circular in relation to PRP in the way it was intended to apply, both in letter and spirit.

31. Agreed quantum in favour of the Plaintiff £8068.17 gross. This figure is subject to deduction of tax and national insurance as appropriate.