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Plymouth Public Schools v. Education Association of Plymouth and Carver 89 Mass. App. Ct. 643 (2016)

In a procedurally complicated matter, both the Massachusetts Appeals Court and an American Arbitration Association ("AAA") Arbitrator considered a teacher dismissal case involving the question of how an excused break in service for maternity leave impacts the calculation of time served for a teacher to attain professional teacher status ("PTS") under G.L. c. 71, § 41. Without reaching the merits of the dispute, the Appeals Court ruled that the question of whether the teacher had PTS, and was therefore entitled to arbitrate her dismissal pursuant to G.L. c. 71, § 42, was for an arbitrator to decide. Devising a novel way to view the years of service requirements for attaining PTS under G.L. c. 71, § 41, the Arbitrator ruled that the teacher in this case had attained PTS and, therefore, her non-renewal was invalid. He reached that conclusion by deciding that the teacher earned PTS on the sixty-first day of her fourth year of teaching because, by that date, she had "made up" for the sixty days of maternity leave she took during the initial three-year period of service.

BACKGROUND

The facts in this case were undisputed. The teacher began working as a special education teacher in Plymouth in March of 2008. The following year, the 2008-2009 school year, she was absent 60 work days, from February 23, 2009 to May 23, 2009 for maternity leave under the Family and Medical Leave Act ("FMLA"). The teacher also accessed a "sick-leave bank" during her absence pursuant to the applicable Collective Bargaining Agreement ("CBA"). By accessing the sick-leave bank, the teacher was paid during her leave.

The teacher then worked two complete school years, the 2009-2010 and 2010-2011 school years. Pursuant to the CBA, Plymouth teachers were required to work at least 181 days, which is one day more than required by Massachusetts regulations requiring schools to operate at least 180 days per year. 603 CMR 27.03. During the 2011-2012 school year, the teacher took another maternity leave of 56 work days (not including vacations) from February 1, 2012 through April 27, 2012. Again, the teacher's maternity leave was covered under the FMLA and

she accessed the sick-leave bank to be paid during her leave. The teacher then worked the entirety of the 2012-2013 school year.

Before the conclusion of the 2012-2013 school year, in May of 2013, the Superintendent sent the teacher a non-renewal notice. The parties stipulated at arbitration and in court that the notice would satisfy the requirements of both the CBA and G.L. c. 71, § 41 to non-renew a teacher without PTS but would not satisfy the due process requirements of G.L. c. 71, § 42 to dismiss a teacher with PTS. Thus, the dispute centered on whether the teacher had attained PTS prior to May 2013. The District maintained that, in light of her maternity leaves, the teacher had not yet met the prerequisites for attaining PTS at the time she was non-renewed. The Union argued that she had already attained PTS.

Pursuant to the non-renewal notice, the teacher was separated from employment in the District at the conclusion of the 2012-2013 school year. As discussed more below, the Union and the teacher initiated arbitration under G.L. c. 71, § 42 to review that decision.

PTS AND ARBITRATION

Before turning to the procedural history and discussion of the Appeals Court decision and Arbitration award, it is important to understand the statutory framework for PTS and the attending rights, including the right of a teacher with PTS to seek arbitral review of a termination. Pursuant to G.L. c 71, § 41, a teacher who has taught for three consecutive school years is entitled to PTS unless he or she received written notice of non-renewal by June 15 of the third school year.

PTS confers upon a teacher a host of protections and benefits. G.L. c. 71, § 42. For example, a teacher with PTS may be dismissed only for cause and only after receiving due process, including a notice of intent to dismiss and a hearing prior to termination. *Id.* Additionally, a teacher with PTS who has been terminated may petition for arbitration to review the termination decision under G.L. c. 71, § 42. A teacher without PTS does not have those statutory rights.

According to long-standing precedent, including *Fortunato v. King Philip Regional School District Committee,* 10 Mass. App. Ct. 200 (1980), in order to satisfy the statutory requirement of serving three consecutive school years to attain PTS, teachers must work complete school years, with only minor deviations. If a teacher works less than a complete school year, *Fortunato* and its progeny hold that the year in which the teacher worked fewer than the required number of school days (181 in the case of Plymouth) would not count toward the three-years-of-service requirement for PTS under G.L. c. 71, § 41.

In another long-standing case considering the interplay between maternity leave and the requirements for PTS, *Solomon v. School Committee of* Boston, 395 Mass. 12 (1985)*,* the Supreme Judicial Court ("SJC") held that a teacher's absence due to maternity leave would not interrupt the consecutive nature of the service under G.L. c. 71, § 41. In other words, although G.L. c. 71, § 41 requires teachers to complete three consecutive years of service, if a teacher takes maternity leave in that three-year period, she does not need to start over at year one again.

The SJC did not answer, however, whether a teacher would need to serve a full additional year or if the teacher could receive partial credit for work performed in the year(s) she took maternity leave.

PROCEDURAL HISTORY

Following her non-renewal, on June 17, 2013, the Plymouth teacher and the Union petitioned the Commissioner of Elementary and Secondary Education ("Commissioner") for arbitration "to determine her PTS status" pursuant to G.L. c. 71, § 42. The District objected on the grounds that the teacher was not entitled to arbitration under § 42 because she did not have PTS. The Commissioner nonetheless forwarded the petition to AAA on January 9, 2014. In the cover letter, the Commissioner instructed the arbitrator to resolve the question of arbitrability before addressing the merits.

On February 18, 2014, Plymouth filed a civil action in the Plymouth Superior Court seeking, among other things, a stay of arbitration. The District simultaneously moved for a preliminary injunction, which the Court denied on March 4, 2014. On March 27, 2014, the Union and the teacher moved to dismiss the Superior Court litigation. While that motion was pending, the arbitration moved forward. Because the parties largely agreed on the facts, they submitted stipulated facts to the Arbitrator, Richard Boulanger, rather than having a full hearing.

Before the Arbitrator issued his decision, a second Superior Court Judge denied the teacher's motion to dismiss, on the grounds that the question of whether the teacher had PTS was for the Court, and not the arbitrator, to decide. Arbitrator Boulanger agreed to hold his decision in abeyance pending resolution by the Court.

On December 17, 2014, the parties filed cross motions for summary judgment in the Superior Court. Following a hearing, the Judge granted Plymouth's motion and denied the teacher's. The Court thus entered judgment in favor of Plymouth, declaring that the teacher did not have PTS at the time she was not renewed and that the non-renewal did not violate the FMLA or Massachusetts parental leave statute, G.L. c. 159, § 105D. The judgment also ordered a permanent stay of the arbitration. The teacher and the Union appealed.

DISCUSSION OF APPEALS COURT DECISION

The Massachusetts Appeals Court reversed the Superior Court, holding that arbitration was the proper venue to determine whether the teacher had PTS. 89 Mass. App. Ct. 643 (2016).

The Court recognized that whether the teacher had attained PTS was the threshold question to determine whether she was entitled to arbitration. Although the Court then referred to the "chicken [or] the egg" type of problem that arises when an arbitrator decides that threshold question of arbitrability, the Court nonetheless concluded that the question of whether the teacher attained PTS was for the arbitrator. *Id.*

In reaching that conclusion, the Court relied on its own precedent. *Turner v. School Comm. of Dedham*, 41 Mass. App. Ct. 354 (1996) and *Lyons v. School Comm. of Dedham,* 440

Mass. 74 (2003). In the *Plymouth* case, like the *Turner* and *Lyons* cases, the Court considered the public policy favoring arbitration and the Education Reform Act of 1993, which "'took away the right of teachers to challenge their dismissal by filing an action in the Superior Court,' and instead 'established arbitration as the sole remedy for all dismissals.'" *Plymouth*, 89 Mass. App. Ct. at 647, *quoting Turner*, 41 Mass. App. Ct. at 357-58 (internal punctuation omitted).

Accordingly, the Appeals Court reversed the Superior Court decision and held that the teacher was entitled to arbitration on whether she had PTS and, if she did have PTS, then she was entitled to arbitration on the merits of her dismissal. *Id.* at 650.

DISCUSSION OF ARBITRATION AWARD

Following the Appeals Court's decision in June 2016, Arbitrator Boulanger released his award, which had been written two years earlier, in June 2014. Devising a novel and impractical way to calculate PTS, Arbitrator Boulanger concluded that the Plymouth teacher attained PTS on the sixty-first day of school in the 2011-2012 school year, which would have been her fourth school year, not counting the half a year she worked in 2008. To reach that conclusion, Arbitrator Boulanger "tacked on" sixty days to "offset" the sixty days of maternity leave she took in the 2008-2009 school year. Although Arbitrator Boulanger's decision is limited to that case, we expect teachers' unions to rely on its reasoning in future cases where a teacher's PTS status is at issue.

Arbitrability

Because the arbitration award was decided before the Superior Court and Appeals Court reached the issue, the arbitrator addressed arbitrability in his award. Relying on the same precedent as the Appeals Court, namely the *Turner* and *Lyons* decisions, as well as *Goncalo v. School Comm. of Fall River,* 55 Mass. App. Ct. 7 (2002), the Arbitrator found the question of whether the teacher had attained PTS to be arbitrable.

FMLA and PTS

Before turning to his opinion, the Arbitrator summarized the parties' positions. In short, the teacher and the Union argued that because her maternity leave was contractually excused and she remained on the payroll (due to her accessing the sick-leave bank), those absences should be credited toward the teacher's acquisition of PTS. In the alternative, the teacher and the Union argued that she should have received credit for her partial years of teaching based on the FMLA's requirement that credit be given for time served. Thus, the Union argued that she attained PTS either at the end of the 2010-2011 school year (if her absences were treated the same as time served) or no later than the sixty-first work day of the 2011-2012 school year (to make up for her 60 days absent the previous school year). In either event, the Union argued that the teacher had PTS at the time she was non-renewed, rendering the non-renewal invalid.

The District argued that the teacher did not earn PTS as of May 31, 2013. The District reached that conclusion by relying on long-standing precedent, including *Fortunato*, that teachers must work complete school years, with only minor exceptions, for those years to count

toward the three years of consecutive service required to obtain PTS under G.L. c. 71, § 41. Further, while *Solomon* made clear that maternity leaves would not break the consecutive nature of the service, it did not sanction partial years of credit or counting absences the same as time served, as the Union would have it. To the contrary, the PTS system, whereby a teacher attains PTS if not non-renewed by June 15 of the third year of teaching, relies upon using full years of service and a date certain for non-renewal, rather than using a teacher's anniversary date or some other date. Thus, the partial years the Plymouth teacher worked did not count toward the three years of service required under G.L. c. 71, § 41 and the District properly non-renewed her before she attained PTS. That result was consistent with the FMLA, the District argued, because the teacher was neither denied benefits nor attained undue benefits from her leave, which is the type of balance the FMLA attempts to strike.

The Arbitrator began his discussion on the merits by quoting G.L. c. 71, § 41's definition of PTS. He then stated that "in *Solomon*,[1] the Supreme Judicial Court (SJC) modified the consecutive year requirement." Award at 16. The Arbitrator noted that, pursuant to *Solomon*, when a teacher's three years of consecutive service are interrupted by maternity leave, the teacher need not begin a new three-year period upon her return from maternity leave. As noted above, however, the *Solomon* Court did not address "whether or not a partial year of teaching offsetting a commensurate partial maternity leave absence would satisfy the requirements of" G.L. c. 71, § 41 because in *Solomon*, the teacher had already worked a fourth year and, thus, was entitled to PTS. Award at 17-18.

Responding to the District's argument that neither the statutory framework, which establishes a June 15 date for non-renewal notices, nor *Solomon* sanctions counting partial teaching years for the satisfaction of § 41, the Arbitrator reasoned that *Solomon* likewise "did not [rule] out the partial year credit." *Id.* at 18. He then recognized that the District properly cited *Fortunato* for the proposition that only minor deviations from working a full year would satisfy the requirements of G.L. c. 71, § 41 but then deviated from SJC and Appeals Court precedent to find that *Fortunato* also made an exception for excused absences.[2]

The Arbitrator then cited the CBA, which provided various options for maternity leave, to which the teacher availed herself. Relying on his interpretation of *Fortunato*, the Arbitrator then ruled that, because the teacher's maternity leave was sanctioned under the contract, her maternity leave "does not weigh against The teacher['s] entitlement to PTS status." Award at 20 (internal punctuation omitted).

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[1] *Solomon* was decided pre-Ed Reform and was based on the Massachusetts Maternity Leave statute.

[2] Both the Union and the Arbitrator rely on broad language in *Fortunato*, which states, in relevant part that "absences which are excused or sanctioned by the contract or by the School Committee would not weigh against the teacher's entitlement to tenure." Award at 19, *quoting Fortunato*, 10 Mass. App. Ct. at 206. The SJC and Massachusetts Appeals Court previously have ruled, however, that that language is not intended to be interpreted as the Union and Arbitrator interpret it. Specifically, in *Matthews v. School Comm. of Bedford,* the Appeals Court held that the "dictum" on which the Union and Arbitrator rely "has been confined in application to consideration of the consecutiveness of a teacher's service" by the Supreme Judicial Court in *Solomon v. School Committee of Boston. Matthews v. School Committee of Bedford*, 22 Mass App. Ct. 374, 378 n.9 (1986).

The Arbitrator proceeded to discuss how his conclusion comported with the FMLA, which ensures that leaves "'shall not result in the loss of any benefit accrued prior to the date on which the leave commenced.'" Award at 20, *quoting* 29 U.S.C. § 2614(a)(2). He also cited the FMLA for the proposition that an employee must be restored to an equivalent position with equivalent benefits following an FMLA leave. The Arbitrator then reasoned that not crediting the teacher with teaching time before and after taking maternity leave would be contrary to those dictates of the FMLA. Award at 20-21.

The Arbitrator also relied on a 1996 U.S. Department of Labor, Wage and Hour Division ("DOL") opinion, based on the law in Illinois, which required teachers to complete a two-year probationary term, based on the teacher's anniversary date. The DOL also reasoned in that opinion that if the probationary time were based on the completion of either hours or days worked, "'the employer could delay granting contractual continued service by an amount reflecting the amount of unpaid FMLA leave.'" Award at 23-24, *quoting* DOL Opinion, 1996 WL 1044777. Without citing precedent, the Arbitrator then reasoned that "[t]hat analysis has applicability to the Massachusetts PTS system because here PTS is based on a 'certain number of days worked[]' (i.e., five hundred forty (540) days)." Award at 24.

Having determined that the teacher must be given credit for the partial years she worked, the Arbitrator then had to determine how to apply that conclusion to the facts of the case. He first dispatched with the Union's argument that the time the teacher was on leave should count the same as time worked, relying on language from *Solomon* rejecting that argument. Award at 24-25. Instead, the Arbitrator determined that the teacher had to "make up" the sixty days of leave and "tacked on" 60 days of "probationary time" onto what would have been her fourth year of service, the 2011-2012 school year. Accordingly, the Arbitrator ruled that the teacher attained PTS as of the sixty-first day of the 2011-2012 school year. Because the teacher had attained PTS prior to being non-renewed in May of 2013, the non-renewal notice was invalid, as it did not meet the requirements for terminating a teacher with PTS under G.L. c. 71, § 42.

Licensure

Another issue the District had raised was that not all of the teacher's teaching time counted toward PTS because she was not properly licensed for the classes she taught. The Arbitrator rejected that argument. In reaching that conclusion, the Arbitrator noted that at all relevant times, the teacher possessed a moderate special needs pre-K through grade 9 license and that there was no evidence that she taught students in grades 10-12 more than 20% of her time, as is permissible under 603 CMR 7.15(9)(a). Therefore, the teacher had a license appropriate to her teaching assignment, as required to obtain PTS. Award at 26-29, *citing Rantz v. School Comm. of Peabody,* 396 Mass. 383 (1985).

Discussion

The Arbitrator's ruling, if applied universally, would upend the well-crafted PTS system established under G.L. c. 71, § 41, which establishes a date certain (June 15) by which Superintendents know they must non-renew teachers and a date that teachers know is the last day for them to receive a non-renewal notice. While the Arbitrator's Award applies to only the

matter before him, school districts should expect to see similar arguments from the teachers' unions going forward and should prepare accordingly.

Likewise, we recognize that making decisions about non-renewing teachers shortly after a maternity leave and prior to the expiration of the three-year period may cause school districts to confront an unenviable choice, between non-renewing a teacher shortly after a leave, thus risking retaliation or discrimination claims (even if meritless), or having a teacher work another year, thus risking an arbitrator finding that she attained PTS by creating a new method of measuring years of service. Superintendents should consult local counsel to navigate this path.

This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.