

BETWEEN:

VINCENT P. LYNCH.

Plaintiff

and

THE GOVERNORS AND THE BOARD OF MANAGEMENT OF  
ST. VINCENTS HOSPITAL.

Defendant

Judgement of Mr. Justice Costello.

Delivered 31st July 1987

*Mary P. Donoghue*  
Registrar

The Plaintiff is a consultant cardio thoracic surgeon and has been on the staff of St. Vincents Hospital, Elm Park, Dublin since 1975. The dispute which has given rise to these proceedings relates to the terms under which he now holds that appointment. Mr. Lynch says that at the end of 1984 he accepted an offer to continue on the staff under the terms of what has become known as "the common contract", that is a standard form of contract relating to the employment of consultants in public hospitals whose terms had been negotiated after protracted discussions which involved representatives of the medical profession and the Department of Health and which was designed to apply to all consultants. The hospital authorities (the Defendants herein) deny that Mr. Lynch is employed under the common contract, claiming that no new contractual relationship arose at that time. Thus arises the issue in the case.

Its facts are largely non-controversial; its outcome depends on the legal consequences flowing from admitted facts. To understand what has occurred it will help if I begin by giving a brief description of the functions of Comhairle na n-Ospideal and the role it has played in this case.

Comhairle na n-Ospideal

The Comhairle was established under the Health Act, 1970 and it is required by section 41(1) (i) (b) of that Act

"to regulate the number and type of appointments of consultant medical staffs and such other officers or staffs as may be prescribed in hospitals engaged in the provisions of services under this Act".

I draw attention to the fact that its statutory function is to "regulate" the appointment of consultants and that its

regulatory powers refer to (a) the number and (b) the "type" of appointments which are to be made. The Comhairle has explained (in its Fourth report for June 1982 to May 1985) how it understands its power to regulate the "type" of appointments:

"The Comhairle interprets the word "type" used in the Health Act to embrace all aspects of the structuring of a job including speciality (and sub-speciality) interest the time commitment involved (e.g. whether wholtime or part-time), the nature of the post (e.g. permanent, temporary, locum) and the hospital or group of hospitals in which the appointment is to be based".

It then went on to make an important point about its statutory functions as follows:

"In considering these aspects, the Comhairle is concerned with the total patient needs as reflected in the existing or potential workload of the hospital concerned and it does not involve itself in questions of public or private practise. Since this is a matter related to remuneration and conditions of employment of consultants, the Comhair has no statutory functions in regard to it" (paragraph 2

It is important to bear in mind that when the Comhairle regulates an appointment, as it did in this case, it has no function in relation to the conditions under which the hospital authorities will employ the consultant who is subsequently appointed, and that when a consultant is appointed to a group of hospitals (as happened in this case) as a result of the Comhairle deciding that an appointment should be a joint one the consultant who is appointed enters into separate contracts with each of the hospital authorities concerned. It is something of a misnomer and potentially confusing to talk of the Comhairle as "creating" consultant posts in hospitals. It "regulates" the type of appointments which are to be made, but the appointments are actually and legally made by the hospital authorities by means of contracts (which prior to the common contract were, it would appear, extremely informal).

Part of its regulatory function is to specify what is termed the "time commitment" of the appointment it is regulating, that is the number of "sessions" (or hours) which the appointee will be required to work in the hospital to which he is appointed or, in the case of a joint appointment, in each of the hospitals to which the joint appointment relates. And one of the questions which arises in this case and which I think I should answer immediately is the legal effect of the 1970 Act of non-compliance with the time commitment which the Comhairle had specified. The answer is, none. The Act merely confers a statutory function on the Comhairle but it does not render illegal or void any arrangement which a hospital authority and a consultant may enter into which is not in accordance with the time commitment specified for the appointment. The sanction for compliance with the Comhairle's regulations is a practical, rather than a legal, one. The Comhairle is, of course, completely independent of the Department of Health, but the Department will only authorise the expenditure of public funds in respect of medical staff employed by public hospitals whose appointments have been made according to regulatory decisions of the Comhairle under Section 41 (1)(i)(b) of the Act. As a general practice, therefore, hospital authorities will not make new appointments save with the approval of the Comhairle and will not alter the conditions of existing appointments which had been regulated by the Comhairle without its approval,

Mr. Lynch's original-appointment:

One of the trends which emerged shortly after the Comhairle was established and which has accelerated in subsequent years has been the increasing number of joint appointments, involving the appointee in commitments to two or

more hospitals, which the Comhairle considered necessary and desirable. Mr. Lynch's original appointment in 1975 was such an appointment. At the end of 1974 there appeared an advertisement inviting applications for the "consultant post of Thoracic Surgeon". The advertisement was headed "The Federated Dublin Voluntary Hospitals" and "St Vincent's Hospital". The "Federated Dublin Voluntary Hospitals" is an organisation of seven Dublin hospitals established by the Hospital Federation and Amalgamation Act, 1961 with a central council which is a body corporate. One member of the Federation is the Royal City of Dublin Hospital (popularly known as Baggot Street Hospital). The advertisement made it clear that the appointment was to be based on a time commitment of nine sessions per week (a "session" being a period of three hours). The appointment had been "regulated" by the Comhairle and it decided that two of the sessions were to be provided in St Vincent's Hospital and seven in Baggot Street Hospital. Although the location of the appointment was stated to be the Royal City of Dublin Hospital there was to be what was called "access" to the Cardiac Surgical Unit at the Mater Hospital. The appointee was to be assigned 15 beds in the Cardiac Unit in Baggot Street Hospital together with one out-patient session and "one notional session" was provided for in the thoracic services to the remainder of the Federated Voluntary Hospitals and St James's Hospital and to allow for access to the Mater Hospital.

Mr. Lynch was the successful applicant and he took up his duties in St Vincent's Hospital on 1st June 1975. The contract between the hospital and himself was informal in the extreme. At its meeting on the 4th May 1975 the Board of Management approved "the appointment of Mr. V.P. Lynch to the post of Joint Consultant Thoracic Surgeon in St Vincent's Hospital and the

Federated Dublin Voluntary Hospitals" as from 1st June 1975 and the Secretary/Manager wrote on the 12th May "welcoming" him to the hospital - questions of salary, leave, and the use of the hospital facilities all being left to informal discussions. His contract in relation to the other part of the joint appointment was made with the Federated Dublin Voluntary Hospital and not with the authorities of Baggot Street Hospital. It would appear that this was equally informal, as was the arrangement for "access" to the Cardiac Unit in the Mater Hospital. For administrative convenience payment to Mr. Lynch for all the nine sessions specified in the appointment was made by the Federation, and it was recouped by the authorities in St Vincent's in respect of the two sessions he worked with them.

The requirements of the Health service are far from static and the demands on hospital facilities are constantly changing so it is not to be wondered at if in the course of time, and particularly in the case of joint appointments, the original conditions of an appointment as regulated by the Comhairle require to be amended (or, to employ the phraseology in use in this case, the post needs to be "restructured"), if it is to accord with changed circumstances. This is what happened in this case. After two years Mr. Lynch ceased to have "access" to the Cardiac Unit in the Mater Hospital and the "notional session" to be provided in the Federated hospitals (other than Baggot Street Hospital) and in St James's never materialised. But in addition and more significantly for the issues in this case the demand for Mr. Lynch's services in Baggot Street Hospital declined whilst the demand for his services in St. Vincent's Hospital had considerably increased. I do not think that Mr. Lynch is exaggerating when he says that the original conditions of his appointment had become

unworkable by the end of 1983. A number of factors helped to bring this about. Because of the nature of his speciality Mr. Lynch receives patients by what it is known as tertiary referral, that is a patient is firstly referred by a General Practitioner to a respiratory physician and then by the respiratory physician to the thoracic surgeon. Baggot Street Hospital had no respiratory physicians and over the years two were appointed to St James's. As a result there was a decline in referrals for thoracic surgery in Baggot Street Hospital and in the period June to December 1983 Mr. Lynch only performed nine chest operations in that hospital. He was attending the hospital to fulfil the time commitment of seven sessions but he had very little to do. The trend was clearly visible at the beginning of 1983 and on the 27th January of that year the Secretary/Manager of St Vincent's wrote to the Comhairle pointing out that Mr. Lynch had been "approved" originally for seven sessions in Baggot Street and two in St Vincent's, that "by sheer practise" the position had by then reversed itself and Mr. Lynch actually worked twenty five hours in St Vincent's and eleven in Baggot Street, and a formal request was made to the Comhairle to review the situation "with a view to an official transfer of the appropriate sessions to reflect his actual commitment". A meeting took place between representative of the Federated group and St Vincent's in March 1983 to discuss all joint appointments. This was because existing appointees were then being required to enter into the common contract and both the Comhairle and the Department had directed that all new contracts should reflect the actual work commitment by consultants at their respective hospitals. At that time it was recorded that as far as Mr. Lynch was concerned his actual commitment to Baggot Street was four sessions (12 hours) and to

St Vincent's seven sessions (21 hours). Further meetings took place in August and September of that year and in September the representatives of the two hospitals reached agreement that there should be a revision of Mr. Lynch's commitments to give him 12 hours in Baggot Street and 21 hours in St. Vincent's. Not only had there been a major alteration in the time commitment to the two hospitals but in fact Mr. Lynch's appointment had become in the official designation a "wholetime" one (as a result of working 33 hours per week in the two hospitals). The Federated group wrote to the Department requesting an increase in Mr. Lynch's commitment from "maximum part-time" to "wholetime", a request which St Vincent's supported in a letter (a copy of which is being sent to the Comhairle) of the 9th September together with a notification that St Vincent's had accepted a division of Mr. Lynch's time to provide for a commitment of 21 hours to St. Vincent's. It is clear that St. Vincent's anticipated that approval to the revision would be forthcoming, a view which was supported by the evidence in this case. But before formal approval was forthcoming from the Comhairle Mr. Lynch had resigned from Baggot Street Hospital - an act which is largely responsible for the legal problems which have now arisen and which I must now turn to consider.

Mr. Lynch's resignation.

On the 16th January 1984 Mr. Lynch informed the senior thoracic surgeon in Baggot Street Hospital that he was resigning from the hospital. He wrote to the chairman of the medical board the next day and also informed the Comhairle and St. Vincent's of what he had done. I accept his evidence as to why he adopted this course. He had been informed by a letter of the 5th January of



a meeting which had been held to discuss the future of cardio-thoracic surgery in the two hospitals. He had not been asked to attend the meeting and was aggrieved that it should have been held without his knowledge and by its conclusions. But he did not resign in a fit of pique: the meeting merely triggered a decision which the frustration of the position in which he found himself in Baggot Street had forced on him. He could no longer tolerate the highly unsatisfactory situation in which he was attending the hospital with virtually nothing to do.

The Board of management took legal advice. It was told (correctly, in my opinion) that Mr. Lynch had a contract with St. Vincent's which was unaffected by his resignation from Baggot Street and the Board informed Mr. Lynch (and the Comhairle) that it was decided that he should continue on the staff under the terms of the original contract, that is on the basis of two sessions per week. This has been the position since then. Although Mr. Lynch has for the past three-and-a-half years been working at least 21 hours per week he has only been paid on the basis of his original contract, that is for six hours.

He has since his resignation received nothing from the Federated group. His contract, it will be recalled, was with the "Federated Dublin Voluntary Hospitals" and not with Baggot Street. The council of the Federation merely "noted" Mr. Lynch's resignation - it did not formally accept it and in fact took no decision on it. This was because it did not want to lose the right to the service of a thoracic surgeon which it had obtained by the original regulation of the terms of the joint appointment made by the Comhairle. Since then it has been paid by the Department in respect of the seven sessions provided for under the original appointment, but it has employed a locum to do the work which

Mr. Lynch had been appointed to perform. No action to regularise the position has been taken by the Comhairle.

Mr. Lynch and the "common contract".

I must now return to the early part of 1983. In 1977 the Minister for Health had established a Working Party to examine and report, inter alia, on the form of contract to be entered into between consultants and their employing authorities, health boards and public voluntary hospitals. The Working Party produced an Interim Report which proposed a number of far-reaching new arrangements which were to apply to all new appointments. As to existing appointments it recommended that each consultant would have the option for a two year period by which he could decide to retain his appointment on its existing terms or enter into the common contract. On the 7th February, 1983 St. Vincent's financial controller sent a letter to Mr. Lynch which stated:

"I enclose copies of common contracts.

When you have perused the documents you could call to Sr. Mary Magdalen's office to sign the same (if you so decide) and get her to countersign. One copy plus additional documents to be retained by yourself and one copy by the hospital".

I will call the document sent to Mr. Lynch on the 7th February the "February document" and examine its contents in greater detail later. There are however two points about it which can be noted now. It was addressed to Mr. Lynch in the hospital (not to his home address). And there was a blank space left in paragraph 6.2 which dealt with the service commitment which Mr. Lynch was to give to St. Vincent's. It is clear why this crucial point was left blank. Just at this time the hospital

had written to the Comhairle suggesting that Mr. Lynch's commitment should be changed from six to 21 hours. When a copy of the common contract was sent to him formal approval of this change had not been obtained. Until the matter had been satisfactorily resolved it was obviously considered desirable not to specify what commitment should be provided for in Mr. Lynch's contract.

Mr. Lynch did not then sign the February draft. He was aware that he had a two-year period in which to consider the position and like other consultants he took his time before committing himself to the new arrangements.

St. Vincent's sent Mr. Lynch a second copy of the common contract. This was produced at the hearing and has considerable bearing on the parties' legal rights. It is undated and Mr. Lynch has been unable to find any covering letter by which it was sent and none exists in the hospital's files. It is addressed to him at his home address in Killiney and is obviously a freshly completed draft (and not a copy of the February document) because the words "Thoracic Surgeon" have been typed in block captials whereas they were typed in lower case in the February document. Most significantly it had completed paragraph 6.2 (which had been left blank in the February document) by inserting in type the figures "21" as the service commitment which Mr. Lynch was required to give under the contract. But although the document is undated I think it is probable that it was sent to Mr. Lynch in the month of September 1983 and I will call it the "September document". It will be recalled that in September 1983 agreement had been reached between the Federated group and St. Vincent's as to how Mr. Lynch's service commitment should be divided between the two groups of hospitals and that on the 9th September St. Vincent's had written to the Department and to the Comhairle

clarified and shortly afterwards to St. Vincent's and to the Federated Dublin Voluntary Hospitals. The replies he received were unsatisfactory and so he decided to seek legal advice. Before he did so, however, he was forwarded by St. Vincent's Hospital (without any covering letter) a copy of a circular sent by the Department of Health to hospital authorities dated the 23rd November 1984. It was in the following terms:

"I am directed by the Minister to refer to previous correspondence regarding the introduction of the Common Contract for Consultant Medical Staff.

Your attention is drawn to the terms of Section 9 of the Interim Report of the Working Party on the Common Contract and the option contained therein. The final option date in relation to all consultants shall be 31st December, 1984.

I am also to remind you that as and from 1st January 1984 all contracts entered into, except in the case of consultants holding teaching appointments shall be operative from a current date, i.e. the date of implementation of each individual contract (as per the Department's Circular SI52/1 of 12 January 1984)".

As a result of the advice he obtained he searched for the documents which he had at home relating to his appointment and found portion of the September document (whose existence he had overlooked). He inserted in the February document the 21 hour service commitment specified in the September document and signed it and delivered it to the hospital with an accompanying letter dated 29th December, 1984 which reads as follows:

"I refer to the letter of the 7th February 1983 offering me an appointment as consultant in Thoracic surgery in St. Vincent's Hospital. I also refer to the copy of the memorandum from the Dept. of Health addressed to the CEO of each Health Board and the Secretary/Manager of each voluntary hospital dated the 23rd November 1984 which you kindly sent me recently. I note that under the terms of that memorandum the final option date as mentioned in paragraph 9 of the Interim Report of the Working Party on the Common Contract is fixed as the 31st December, 1984.

Having considered the matter I now give you notice that I accept the appointment offered by you, in the terms therein stated and in accordance with the Working Party Report and I enclose herewith the form of acceptance duly completed.

I shall draw your attention to the fact that through what appears to be a clerical error the actual number of hours per week to be devoted to eligible patients (par. 6.2) appears to have been omitted from your letter of the 7th February, 1983. However in a somewhat similar though undated letter (copy enclosed) the number of hours was set out at 21 per week and I have therefore inserted that figure. If the hospital wish to increase that figure I would have no objection".

To ascertain whether this brought into existence a new contract between him and the hospital it is necessary to consider in some detail the terms of the February document.

The document sent to Mr. Lynch on 9th February 1983 began by stating:

"You are hereby offered an appointment of consultant in Thoracic Surgery under St. Vincent's Hospital Board of Management from the 1st January 1983 subject to the terms and conditions specified in this contract and in the documents stated to be appended thereto: these jointly being the contract documents"

And paragraph 2 stated:

"If you agree to accept the appointment on the terms indicated, you should sign the form of acceptance at the foot of this document and return it to the Secretary/Manager, St. Vincent's Hospital. A copy of the contract documents is attached and should be retained for future reference".

Details of terms of appointment then followed and after a space left for the signature of someone acting on behalf of St. Vincent's Hospital the last paragraph of the document read:

"Acceptance (do not detach)

I hereby accept the appointment offered above by Secretary Manager St. Vincent's Hospital, Board of Management on the terms and subject to the conditions of appointment referred to and I undertake to commence

my duties with St. Vincent's Hospital, Board of Management on the 1st January, 1983".

The contract which was then sent for signature was, however, not complete. Section 6 was headed "Service Commitment and Rights of Consultant". Its first paragraph (6.1) stated that the type of appointment offered by the contract had been regulated by the Comhairle in the manner following. And paragraph 6.2 read:

"On the basis of the provisions of paragraph 6.1 the scheduled service commitment of this appointment in respect of eligible patients shall be            hours per week".

Quite clearly Mr. Lynch could not have entered into the common contract on receipt of the document as it did not contain a crucial term (the service commitment to be given under the contract).

I will now consider the legal effect of Mr. Lynch's signature to the February document and his letter of the 29th December 1983.

(a) It is pleaded in paragraph 4 of the Defence that the offer made on the 7th February 1983 was for appointment of the Plaintiff on the basis of his working two sessions within the Defendant's hospital but subject to its being previously structured by Comhairle na n-Ospideal. This is incorrect. The service commitment was left open in the document because, as I have already pointed out, negotiations were in train with the Comhairle and the Federated group on the subject.

(b) It is pleaded in paragraph 4 of the Defence that the Defendants could not offer any appointment for the Plaintiff's commitment to sessions in excess of those structured by Comhairle na n-Ospideal. This is not a correct interpretation of the legal position. As I have already pointed out there was nothing in the Health Act, 1970 or elsewhere which prohibited by law the

hospital from amending Mr. Lynch's existing service commitment even though it resulted in a service commitment different to that specified by the Comhairle when it originally regulated the appointment. Furthermore, it will be recalled that the hospital was prepared to enter into the contract with the amended service commitment in November and December 1983 even though it had not been formally sanctioned by the Comhairle at that time.

(c) It is pleaded in paragraph 5 of the Defence that the Plaintiff did not accept the offer made on the 7th February 1983 but made a counter offer which could not be lawfully accepted by the Defendants. This is not correct. In the light of the September document (which completed the space which had been left blank in paragraph 6.2 of the February document) Mr. Lynch was entitled to regard the hospital as having offered him a contract which contained a service commitment of 21 hours, a point which is reinforced by the letter from the hospital of the 12th December 1983 requesting him to sign the common contract "as it now stands - seven sessions for SVH". By filling in this figure in the February document the Plaintiff was not making a counter-offer; he was merely inserting in the document the terms offered to him by the hospital. For reasons already stated by doing so and by signing the document he was not creating an illegal contract

(d) Mr. Lynch of course knew that the hospital was in correspondence with the Comhairle about the variation of the term of his original appointment relating to his service commitment to St. Vincent's Hospital. But when the September document was sent and a completed offer made to enter into the common contract with Mr. Lynch on the basis of 21 hour service commitment this offer was not made conditional on its terms being approved by the

Comhairle, a point amply illustrated by the letter of the 12th December, 1983.

(e) Mr. Lynch had originally entered into two separate contracts at the time of his appointment to the staff of St. Vincent's Hospital and the staff of Baggot Street Hospital. His resignation from the staff of Baggot Street Hospital had no effect on his contract with St. Vincent's Hospital. At that time a completed offer of a new contract had been made by St. Vincent's Hospital. It was never revoked. Indeed the transmission to Mr. Lynch of the Departmental circular of 23rd November 1984 confirmed the existence of the offer. It has been stated in evidence that the transmission to him of the circular was due to an oversight. But even if this is so Mr. Lynch was entitled to treat it as confirmation that the offer of the common contract still stood.

(f) The offer of the common contract by St. Vincent's Hospital was not made conditional upon Mr. Lynch entering into a similar contract with the Federated Dublin Voluntary Hospitals. The common contract could have contained a clause to the effect that in the case of joint appointments its validity depended on the execution of a common contract with each of the hospitals involved in the joint appointment. But it did not and the offer made by St. Vincent's Hospital was not qualified in any way.

(g) The contract document was not signed by someone on behalf of the hospital. But such signature was not necessary in order to create a contractual relationship between the parties. The hospital had clearly offered to enter into the contract with the Plaintiff. The terms of the offer were complete. And the hospital made it clear that it would regard itself as bound by



the contract once it was signed by Mr. Lynch.

(h) Finally, it was submitted that the February document was merely a contract sent for approval and not for signature and that an acceptance of a draft offer cannot operate to conclude a contract. I agree that the offer made in February 1983 was incomplete, but that does not mean that it can be regarded as a draft sent for approval - its terms expressly provide that signature of the document would amount to acceptance of the appointment on the terms of the document. A completed offer was made by the transmission of the September document to Mr. Lynch.

I conclude therefore that Mr. Lynch's signature to the document which he delivered to the hospital on the 29th December 1984 was effective to create a binding contract between him and the hospital on the terms contained in that document and he is accordingly entitled to a declaration that he has lawfully and validly accepted an offer of employment made by the Defendants for an appointment as consultant in thoracic surgery with a commitment in respect of eligible patients of 21 hours per week.

There is one final comment that I should make. It was indicated in the course of the evidence that a view had been expressed by an official in the Department of Health that the execution of a new contract between the hospital and Mr. Lynch would involve the creation of a new post and that the embargo on recruitment to the public service meant that it could not be funded from public funds. The recruitment embargo does not fall for consideration in this case. But I think I should make clear firstly that today's decision confirms the existence of a contract made on 29th December 1984 and does not require the execution of a new contract by the parties, and secondly that by entering

on 29th December 1984 into the contract the parties did not create a new post - they merely carried out procedures which had been approved by the Department and the Comhairle for the execution of a common contract by consultants holding existing appointments which would reflect the time commitment actually given by consultants at the time the contract was executed.

*approved*

*JL*

*31.2.87*