IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

FILED

January 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

BRENDA UNDERWOOD, Plaintiff/Appellant v. MacMILLAN/McGRAW-HILL SCHOOL PUBLISHING COMPANY, and its general partners, McGRAW-HILL SCHOOL PUBLISHING, INC. and MacMILLAN SCHOOL PUBLISHING, INC., Defendants/Appellees	)	HAMILTON CHANCERY NO. 03A01-9510-CH-00357 AFFIRMED

Steven F. Dobson and Stacie L. Caraway, Chattanooga, For the Appellant.

Jeffrey S. Norwood and Karen M. Smith, Chattanooga, For the Appellee.

O P I N I O N

_____INMAN, Senior Judge

I

This action to recover a contractual bonus was decided adversely to the plaintiff on the narrow ground that she was not on the defendant's payroll on January 1, 1993, allegedly a condition precedent to her entitlement to the bonus.

The plaintiff presents for review the issues of (1) whether the contract was correctly construed, and if so, (2) whether she was nevertheless entitled to recover under *quantum meruit.*

II

The plaintiff began working for McGraw-Hill in May, 1990 as a national consultant for the publication and sale of math and science textbooks.[1] Her primary duty was to provide support services for the sales force in the nature of workshops, in-service training to teachers, and sales presentations, for which she was paid a

[1]Her career in this field began in June, 1982 with Merrill Publishing Company, which was acquired by McMillan-McGraw-Hill in 1989.

significant annual salary. In addition, there was made available to the plaintiff the opportunity to earn additional income in 1992 through a Sales Incentive Plan for National Consultants. This Plan served a duality of roles: it created an incentive for employees to stay with the company a full year and thus earn the bonus and encouraged the generation of greater profits through increased sales. A quota was established for each National Consultant, whose incentive pay was determined formulaically. The plaintiff exceeded her quota, thus entitling her to an amount equal to her 1992 salary, but for the following provision in the Plan:

> " . . . Except as stated herein, employee must be on the Glencoe[2] payroll on January 1, 1993 to receive any payment from this plan . . ."

On October 14, 1992, she faxed the following manuscripted letter to her supervisor:

> Steve,
> An opportunity has been offered by another company and I have decided to accept. Please accept this as my resignation effective October 31, 1992.
>
> Brenda Underwood

Because she was not on the defendant's payroll on January 1, 1993, the Chancellor accepted the argument that the condition precedent had not been met and the case was dismissed.

III

The plaintiff's argument centers upon another provision of the Plan entitled "Retirements, Terminations and other Separations," which provides that

> "Calculations of incentive compensation for cases involving retirement, involuntary severance and related cases will be based on final year-end achievement against quota and will be paid before March 31 following the end of the plan period. Any participant who is dismissed for cause or reasons of misconduct at any time during the year will not receive any monies from the plan."

The thrust of the plaintiff's argument is directed to the words "Retirement and Other Separations." She argues that the employer thus provided a specific

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[2]A division of McGraw-Hill.

exception ["except as stated herein . . ."] to the requirement that to be eligible for the bonus, an employee must be on the payroll on January 1, 1993, since her departure the preceding October was a "retirement." The argument continues that the defendant drafted the inartfully drawn Plan, that it is ambiguous and, as a consequence, must be construed against the employer.

We find no ambiguity in the language employed, and it is not permissible to create an ambiguity where none otherwise exists. *Rogers v. First Tenn. Bank Nat. Ass'n.,* 738 S.W.2d 635 (Tenn. App. 1987). A contract should be interpreted and enforced as written, *Rapp Const. Co. v. Jay Realty Co.,* 809 S.W.2d 490 (Tenn. App. 1991), without placing a strained construction on the language used to find an ambiguity. *Empress Health and Beauty Spa, Inc. v. Turner,* 503 S.W.2d 188 (Tenn. 1973). Applying this well-settled standard, we conclude that the word 'retirement' should be accorded the meaning the whole world accords to it. Aside from the fact that the employer offered evidence without objection or refutation that the plaintiff did not retire, but resigned her position, we think it is clear beyond peradventure that the Plan contemplated withdrawal from a working career with McGraw-Hill in accordance with a scheduled, pre-existing arrangement involving tenure and compensation.[3] It cannot rationally be said that the words 'retirement' and 'resignation' are synonymous, and we agree that the plaintiff simply quit her job at McGraw-Hill. Unfortunately for her [the record does not reveal the benefits package offered by Prentice-Hall or the inducement to accept employment by it] had she waited about nine weeks, she would have apparently qualified for the bonus. But this is developed in hindsight, and we are required to enforce the Plan as written without superimposing notions upon it or otherwise re-writing it. Taken as a whole, the contract clearly expresses the intent of the parties, that to be eligible for the bonus the plaintiff was required to be on the payroll on January 1, 1993, *Rogers, supra.* We agree with the Chancellor's conclusion that lack of payroll status on that

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[3]It was stated during argument that the plaintiff's 401k plan was rolled over to her new employer, Prentice-Hall, the principal competitor of McGraw-Hill. Her territory and duties are described as being the same with Prentice-Hall as with McGraw-Hill.

date precludes the plaintiff from relief.

IV

The plaintiff raises the issue on appeal of *quantum meruit,* arguing essentially that fairness requires that she should be compensated pro-rationally to the benefits her labor conferred upon the defendant.

This ground for relief is not mentioned in the complaint, and cannot be considered for that reason. But we note in passing that any enrichment of the defendant must be unjust, *Paschall's Inc. v. J.P. Dozier,* 407 S.W.2d 150 (Tenn. 1966), and it must appear that it would be inequitable to allow the defendant to retain the benefits without a concomitant payment to the plaintiff. It does not appear that the defendant was unjustly enriched, since it paid the plaintiff a handsome salary who presumably was required to give her best efforts quid pro quo. Moreover, we think the principle of *quantum meruit* ordinarily cannot be applied to agreements deliberately entered into by the parties. *See* 17 C.J.S. Contracts, § 6 (1963).

Our review is *de novo* on the record accompanied by the presumption that the judgment is correct unless the evidence otherwise preponderates. TENN. R. APP. P., RULE 13(d). We cannot find that the evidence preponderates against the judgment, and it is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

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Herschel P. Franks, Judge

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Don T. McMurray, Judge