

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

10 Employees

UD1201/2004
UD1202/2004
UD1203/2004
UD1204/2004
UD1205/2004

UD1206/2004
UD1207/2004
UD1208/2004
UD1209/2004
UD1222/2004
UD1223/2004

against the recommendation of the Rights Commissioner in the case of:

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Petty

Members: Mr. B. O'Carroll
Mr. T. Kennelly

heard this appeal at Galway on 18th April, 30th August and 31st August 2005

Representation:

Appellant(s) : Ms. Diane Jackson, (Branch Secretary), S I P T U, Forster Court, Galway

Respondent(s) : Mr Eamonn Hunt, Local Government Management Services Board,
Cumberland House, Fenian Street, Dublin 2

The determination of the Tribunal was as follows:-

The respondent name was amended to include XXXX only and not the named individual.

This case is before the Tribunal by way of two appeals against the decision of a Rights Commissioner of the above named claimants -v- Galway County Council and one other (ref: **UD19680/04 & UD 17647/03**).

Respondents Case:

The first witness for the respondent was the county manager of South Tipperary County Council. He was a member of the management team in negotiations, with groups of unions nationally, of retained fire fighters since 1980. The witness told the Tribunal that the management service board negotiates nationally and the fire fighters are just one of the groups involved. Most counties have retained fire fighters who are on call twenty-four hours a day. Most of them have employment elsewhere. The respondent county council and some other counties have full time fire fighters.

The background of retirement goes to 1968. The witness stated that at that time the county and city management discussed and agreed with ICTU the standard terms and conditions for retained fire-fighters. One was gratuity paid at fifty-five years of age and earlier if certified unfit. In 1983 the Union lodged a claim to increase the gratuity. Management had a number of conditions be put in place and one was that the age of fifty-five was to be enforced. The witness referred to and quoted from the Labour Court Recommendation 9605 and quoted para 5.(1) which showed that the unions were not objecting to the enforced age of fifty-five.

The union because of monetary value did not accept the recommendation; it was accepted by management and implemented. A circular dated 12th June 1989 was issued to all on foot of the Labour Court Recommendation stating all fire fighters are to retire at fifty-five. The witness stated that there was a two-year transition period to allow a phase in.

In 1989 the Unions again raised questions and the matter went back to the Labour Court and an increase in gratuity was recommended which both sides accepted. The witness stated that although it was accepted by both sides difficulties did arise in local authorities and it ended up in the Employment Appeals Tribunal and at Circuit Court Appeals. The witness read an extract from the Judgement of Mr Justice Barron delivered 18th May 1991.

In evidence the witness stated that notwithstanding the Labour Court Recommendation there were other difficulties. The Unions wanted a standard uniform approach to the retirement age and made a submission to the Labour Court on the 23/7/2002. The outcome of that hearing was that an expert group was to be set up to establish the appropriate age for retirement. The witness stated that management accepted the recommendation to set up the group but the unions didn't and notice to strike was served on the 12th November 2002. An emergency meeting took place and lasted for more than 14 hours, at the conclusion of the meeting it was agreed to accept and implement whatever came out of the group. The basis of the agreement was read into evidence. A letter from the union dated 5th November 2002 was issued confirming the withdrawal of strike notice. Both sides committed to something and both sides wanted to bring finality to the issue.

The witness outlined management's position on the issue to the Tribunal, which was that they had no difficulty with the age of fifty-five based on international practice and they were prepared to take on board the Labour Court recommendation and prepared to sit and review what ever the appropriate age should be. The witness stated he thought it was fair to say that the union were unhappy with the lack of uniformity and manner of implementation. Their claim was to increase the age from fifty-five to sixty.

The report of the expert group dated April 2003 was introduced in evidence and the witness referred to point 4 of its findings. The group accepted that there were a small number of people who had contracts that stated an age other than fifty-five and the group decided to honour those contracts. The witness stated that those persons without contracts were discussed in the context that the group was aware of three categories of fire fighters;

1. Those that had written contracts that stated age of fifty-five years
2. Those that had written contracts that stated other than fifty-five years (sixty years)
3. Those that had no written contracts.

The group considered and came to the conclusion that with the expectation of those without written contracts that the report should relate to the others. A second group looked at the gratuity issue and subsequently found an increase of somewhere in the region of 35%. The witness also stated that the arbitrators reported on gratuity and indicated that it had regard to the retirement age.

The witness told the Tribunal that the report has been implemented in most local authorities but it has been challenged in Galway and Leitrim as far as he knew. The witness stated that the group was asked to reconvene before the Employment Appeals Tribunal hearing date. The witness stated that the group were of the view that the report was clear and unambiguous and was not open to misinterpretation and the matter was closed.

Under cross-examination, the witness told the Tribunal that he disagreed with the fact that the union's argument was based on the fact that the retirement age of fifty-five was for new entrants and not to make changes to existing fire fighters. The witness stated that after 1985 if there had been an issue with the retirement age the unions would have come back on it then. The witness stated that the report and group said all grades and the only exclusions were those who had no contracts. When told that not all local authorities had implemented the report as negotiations were ongoing nationally, the witness replied that most local authorities had implemented the report. The witness accepted that the response issued to the union dated 31st July was a refusal to meet the union.

The second witness for the respondent was a director of services for the respondent. The witness told the Tribunal that the normal age of retirement is fifty-five years of age. There are some with no contracts who have had an expectation of employment beyond that year. The witness stated that there were discussions held in 2001 regarding the number of retained fire fighters retiring on ill health, retiring age and enhanced gratuity. A meeting was held on the 25th July 2001 on the number of retained fire fighters who were retiring and had maximum gratuity of 2.5 times the retainer. There was a provision for a maximum of three times the retainer and the union was anxious to implement that. A second meeting was held on the 30th July 2001 and arising from it an agreement was hammered out. The terms of the agreement were set out in a letter dated 31st July 2001, which was read into evidence. The date of implementation was being agreed locally and on that basis enhanced gratuity would be paid.

The union held a ballot and accepted the agreement a letter of confirmation was sent by the union dated 1st October 2001, attached to it was a list of names for confirmation. The witness stated that the eleven claimants were on the list. The witness stated that there was no question in the agreement that persons without contracts would be excluded. The witness told the Tribunal that the 2001 agreement was implemented by the respondent, the enhanced gratuity was linked to the retirement age of fifty-five. The transition period ended on the 26th October 2003 but in the interim an expert working group came into play. The witness stated that the respondent used it. In 2001 the gratuity was three times the retainer and the expert group recommended four times the retainer.

The witness told the Tribunal that the claimants were due to retire on the 26th October 2003, allowing for the two-year transition. The claimants were paid as per the agreement set in 2001. The witness stated that he believed all cheques were cashed.

When cross-examined the witness accepted that before 1985 it was generally accepted that the retirement age was sixty-five and that age applied to those who had no written contracts. He said that he could not comment on an individual that may be retiring at age sixty-five. The witness was referred to the letter dated 31st July 2001 that set out the terms agreed at a meeting on the 30th July 2001 and it was put that the council put the word “required” (by the council to retire) in. It was put to the Tribunal that the discussions held suggested that the words “may be” were to be in the letter, not “required”.

The witness was referred to a letter dated 28th November 2003, (read into evidence). The witness stated that it was a particular situation in a particular area where if the fire fighter retired they would be left in a situation where the area would have no one to drive the brigade. It was felt that it was only right to offer that particular individual a temporary contract while they tried to recruit someone else. The witness stated it was an emergency situation. When it was put to the witness that the council had no substantial grounds to dismiss the claimants, the witness stated that they were not dismissed they reached the normal age of retirement as required by the expert group.

The respondent company was invited to summarise their position. Respondent’s representative told the Tribunal that the claimants were retained in accordance with the normal retirement age that had been changed from 55 to 58 in accordance with the report of the expert working group – negotiated by both parties and including recommendations made by the Labour Court.

Appellants’ Case:

The first witness is a member of the national retained fire-fighters’ committee since March 2000 to date. He had been employed as a retained fire fighter for fifteen years and had been involved with the Labour Court case in 2002. The witness told the Tribunal that the original claim that was presented to the Labour Court was to increase the retirement age from fifty-five years of age to sixty years of age for those that had contracts stating that their retirement age was fifty-five years of age. Disagreement with the recommendation of the Labour Court on this issue led to the establishment of an expert working group to explore the issue. The witness said that the findings of the working group only applied to those fire fighters who had signed contracts and who joined the service in the 1980s. The appellants had all joined the service in the sixties and seventies and had no contracts. They had a genuine expectation to work until the age of sixty-five subject to medical fitness.

The witness told the Tribunal that over the years with different agreements, the gratuity had been changed for retained fire fighters but the age of retirement had been only applied to those that had the age specified in their contracts.

Under cross-examination, the witness told the Tribunal that the matter of reducing the retirement age had never been discussed – the only objective was to increase the age of fifty-five to sixty. The appellants had a verbal arrangement and the expectation to retire at age sixty-five. The working group established a retirement age of fifty-eight years of age that was a compromise for both sides. The witness agreed that it may have been prudent at the time of the negotiations to include circumstances similar to the appellants’, but these circumstances had never been addressed.

The second witness for the appellants’ case is a retained fire fighter in a different local authority employed since June 1969. He told the Tribunal that when he was employed he received terms and conditions at the time that stated that the retirement age was sixty-five. He is sixty-four since May 2005 and is still employed. He is not unique in the service and has other colleagues that have an expectancy of retiring at the age of sixty-five. The witness said that he was aware of two other employees that were retained in employment until the age of seventy-one and seventy-two years of

age. The witness told the Tribunal that he had a role on the national negotiating committee of retained fire fighters and had taken part in the negotiations in an advisory capacity.

Under cross-examination, the witness told the Tribunal that the retirement age of fifty-five was not included in contracts (oral or otherwise) until after 1983. After negotiations took place, every person in service before 1983 were allowed to stay until age sixty-five and the debate at national level was specific to employees that joined after 1983.

The third witness for the appellants' case was the local shop steward and the second named appellant above. He told the Tribunal that he commenced employment with the respondent in 1974 and had been told at the time that he would be employed until "at least" the age of sixty-five. He had the expectation to retire at sixty-five and he was sure that all of the above-named appellants had the same expectation. The witness was aware of three firemen who had retired in 2001. Two had retired due to ill health and the other had been happy with the level of gratuity received. The witness said that this was the first indication that the appellants had that there was a problem regarding the retirement of members. There was a meeting between the union and the management of the respondent (which the witness attended) and an agreement was reached. The witness was told at that meeting that there needed to be some agreement reached regarding the age of retirement if the gratuity level was to be raised.

There was a document produced as a result of this meeting and after negotiations, the phrase "may be (required to retire)" was associated with the retirement age clause. The witness told the Tribunal that this had never been intended to be used and it was indicated to him that the only function was to regularise the position at that time with no effect for members already serving. The witness was aware of the negotiations at national level but was not aware that the terms agreed applied to him or anyone else in a similar position to him. When the witness was informed of his retirement date by letter, it was the first he knew of it. He was hugely shocked and had not budgeted for it. The witness felt that he had been unfairly treated and found it very hard to live with. The witness was subsequently offered a six-month contract to replace a driver on sick leave, but he turned it down. Eventually he accepted a contract position for one year to help the station out of difficulties.

The witness told the Tribunal that he had no difficulties in meeting the requirements of medical assessment set down by the respondent. He was aware that other fulltime fire fighters employed in the urban area by the same respondent have been retained until the age of sixty-five. As this is based on the unavailability of fire fighters, the witness conceded that this practice was not unusual at all and it made his compulsory retirement all the worse.

Under cross-examination, the witness told the Tribunal that the "enhanced gratuity" had been accepted during the course of the negotiations but the negotiators on the staff side never expected the retirement age to be implemented for staff that were serving already. The witness had never worried that he was included in the categories being negotiated as the only claim being discussed was concerning an increase in the retirement age from fifty-five years of age to fifty eight years of age. This was only concerning those fire fighters that had a contract stating their retirement age was fifty-five years of age. This is why the witness felt exempt from the provisions of that part of the agreement.

As far as he witness was aware, he never signed anything that would have changed his date of retirement. He assumed that the category he fell under was to be addressed by the expert working group at a later stage, but this never happened.

The fourth witness for the appellant was the ninth named appellant above. He confirmed to the Tribunal that he received the same letter as the previous witness requiring his retirement at the age

of fifty-seven. He turned fifty-eight the following month. When he attended a hearing at the Rights Commissioners, he was awarded the month's pay in the difference. He assumed that he had been exempt from the agreement by virtue of his length of service and the lack of a contract stating the retirement age.

Under cross-examination, the witness told the Tribunal that he had worked for approximately thirty-seven years for the respondent. He had been aware of the agreements reached but was not aware of the specifics, as he did not think they applied to him. The witness did receive his gratuity payment in respect of the terms of the agreement.

The fifth witness for the appellant was the representative for the named appellants above. She told the Tribunal that she is a Branch Secretary that represents the fire fighters within the county council. She was aware of both retained and full time fire fighters that were employed under the similar contracts as the appellants (with regard to retirement age). These staff members were employed prior to the introduction of the retirement age of fifty-five years of age. The respondent has accepted in the past, that full time fire fighters in this category have worked until the age of sixty-five while the part-time staff members have been required to retire. The witness told the Tribunal that there was a definite distinction between full time and part time staff and in the case of the part time staff, their treatment was less favourable.

Under cross-examination, the witness told the Tribunal that she was referring to an element in the "Part-Time Workers Act" pertaining to the different treatment of different categories of staff within the grade of fire fighters. The witness had not been involved in any negotiations regarding the retirement ages or payment of gratuities to retained fire fighters. However, she did accept the terms of the agreements as they were written. The witness also reiterated the fact that she believed that the report of the expert working group did not refer to the claimants.

Determination:

The Tribunal, having considered all of the evidence and submissions made by the two parties to the case, determines that the report of the expert group cannot apply to the eleven named appellants named above. The final paragraph of this report states that these terms apply to all retained fire fighters whose written contracts of employment specify a retirement age beyond the age of fifty-five.

The Tribunal accepts that the legitimate expectation of the eleven appellants, on joining the fire service, was that they would continue and work until retirement at age 65, subject to their medical condition permitting them to work as fire fighters. Furthermore, the un-contradicted evidence of the appellants was that they had all undergone their regular medical check, as requested by their employers on a regular basis and all had been passed fit at the date of dismissal and their dismissal was therefore not on the grounds of any medical unfitness for work.

The High Court decision in the case of the County Council of the County of Donegal and Neil Porter and others delivered on the 23rd March 1993 at Letterkenny by Mr. Justice Fergus Flood was opened in argument before the tribunal. At pages 3 and 4 Mr. Justice Fergus Flood states

"1. That the respondents and each of them are employed on the basis of an expectation-, all things being equal, they would continue in the fire brigade service up to age 60.

2. That nothing has occurred in the intervening years which could be said to alter that state of affairs by consent.

3. In principle, in my view the attempt to force them into retirement by dismissal at age 55 is an attempt to unilaterally alter that contractual situation and would be in breach of contract unless it can be justified in some other lawful way.”

Following the reasoning in that case which is accepted by the Tribunal as being applicable to claimants' circumstances in the particular cases under decision, the Tribunal must find in favour of the appellants unless we find that the terms of their contract have been altered in some lawful way since their initial engagement. The Tribunal finds that this was not the case.

The Tribunal upsets the recommendation of the Rights Commissioner and determines that the appropriate remedy under the Unfair Dismissals Acts, 1977 to 2001, for ten of the named appellants above is **reinstatement**.

In the case of one of the appellants (the first named above, Mr S.), who has now reached the age of retirement (sixty-five), the appropriate remedy is compensation. Therefore, based on the agreed figures of loss of earnings between the parties, the Tribunal awards the first named appellant the amount of **€69554.02** under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)