EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
UD1008/2006
Employee MN656/2006

against

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. J. O'Neill
Mr A. Butler

heard this claim at Dublin on 21st March 2007
and 17th October 2007

Representation:

Claimant: Ms. Elaine Kelly, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

Respondent: Mr. Liam Riordan, Arthur O'Hagan, Solicitors, Charlemont Exchange, Charlemont Street, Dublin 2

A preliminary issue was raised as to whether the Tribunal had jurisdiction to hear the matter in circumstances where the Respondent submitted that the Claimant was bound by the terms of a fixed term contract and therefore had waived her rights under the Unfair Dismissals Acts, 1977 to 2001.

Respondent's submissions on the preliminary issue [as extracted from written submissions]:

The signed contract contained the following clause:

"6. The contract is a fixed term contract of one year's duration for the purpose of section 2(2) (b) of the Unfair Dismissals Act, 1977, as amended and derives from the sanction of the Department of Education and Science for a one year Temporary Post teaching English to Non-National pupils. Further, the Teacher agrees that the provisions of the Unfair Dismissals Act 1977 or any amendment thereto shall not apply to a dismissal consisting only of the expiry of the said term without it being renewed."

This written and signed contract is the contract which was binding on both parties at the time of termination of the Claimant's employment.

The preliminary issue to be determined is whether the provisions of the Unfair Dismissals Act, 1977, as amended apply in this instance in view of the Exclusions provisions set out in section 2 of the Act, and in particular, section 2(2)(b).

The Law

Section 2(2) (b) of the Unfair Dismissals Act, 1977 to 2001 provides that:
" This Act shall not apply in relation to:

(b) dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid"

Clearly, in this instance there is a written contract of employment, and it is the "*contract of employment*" for the purposes of section 2(2)(b).

The Claimant submits that to have any effect the waiver "*must*" be in place "*when the contract is entered into*". This is not stated in the Act. The Claimant refers to Redmond's *Dismissal Law in Ireland*, however Dr. Redmond does not state that the waiver "*must be in place when the contract is entered into"*. She in fact states that the conditions "*should*" be satisfied "*at the time the contract is made*".

Clearly there is no requirement at law that a written contract be in place at the time of commencement of the term of the contract of employment.

Dr. Redmond in her discussion on the waiver clearly states that "*any provisions excluding employment rights will be strictly construed*"

Section 2(2)(b) of the Unfair Dismissals Act, 1977, as amended, clearly applies to the instant case in that the three criteria established therein are met.

The Claimant appears to be arguing that the waiver clause ought to be "*struck down*" by the Tribunal. What the Tribunal in fact is being asked to consider is whether, in view of the provisions of section 2(2)(b) of the Act, the Claimant's case is excluded from the jurisdiction of the Tribunal.

It is submitted that that the waiver clause was brought to the Claimant's attention, as evidenced by the fact that she signed the contract which clearly contained the relevant clause.

The basis for the Claimant's submission that the waiver clause should be disregarded appears to be grounded on the jurisprudence of *Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163* which was endorsed in this jurisdiction by Costello P. in *Carroll v. An Post Lottery Company [1996] 1. I.R. 443.*

In the case of *Eamon Finnegan and J & E Davey, The High Court 26 January 2007*, the Defendant sought unilaterally and retrospectively to alter the Plaintiff's terms of employment with an onerous provision relating to the deferral and retention of appreciable percentages of bonuses, which in effect amounted to a restraint of trade.

Unlike the *Carroll* case where it could not be shown that the Plaintiff was aware of the terms being imposed, it can be clearly established, in the instant case, that the Claimant agreed to the waiver clause because she signed the contract indicating her acceptance of same.

It is of note that all of the cases cited in the Claimant's submission involve situations in which the Plaintiffs were not signatories to any agreement and where the exemption clauses relied upon were onerous or unusual. In the instant case the Claimant was a party to the contract and her acceptance of the clause now complained of was evidenced by her signature on the contract.

The contract signed by the Claimant and containing the waiver is a standard fixed term contract of a kind which is in widespread use throughout the education sector.

The Respondent would not be entitled unilaterally to vary the Claimant's terms of employment, but in circumstances where the Claimant accepted the contracted terms, the Respondent is entitled to rely on the contract and the waiver.

Conclusion

The suggestion at paragraph 11 of the Claimant's submissions to the effect that the waiver clause " *has no effect*" is unsustainable.

It is clear that there is a written contract in place and that it meets the criteria set out in Section 2(2) (b) of the Unfair Dismissals Act, 1977, as amended.

The Respondent is entitled to rely on the signed contract and because the dismissal of the Claimant consisted only of the expiry of the fixed term of the contract, the Unfair Dismissals Acts do not apply.

Claimant's submissions on the preliminary issue [as extracted from written submissions]:

The Claimant commenced employment with the Respondent on 23 September 2003, at which time she did not receive a written contract of employment.

During the summer of 2005 she was required to re-apply for the position held by her. She did not sign any contract of employment on taking up that position.

Subsequently, at some stage in 2006, the Respondent furnished the Claimant with an undated document which purported to be a contract of employment for the 2005-2006 school year. That document was signed by the Claimant and it contained the above clause 6 (see Respondent's submission).

The Law

Section 2(2) (b) of the Unfair Dismissals Act, 1977 to 2001 provides that:
" This Act shall not apply in relation to:

(b) dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid"

The Respondent claims that clause 3 in the document produced at some time in 2006 is in accordance with this section. In *Dismissal Law in Ireland,* Redmond deals with this provision in the following terms:

" *Where such contracts expire either because the term expires and the contract is not renewed in the case of a fixed term contract or the specified purpose is completed, the Unfair Dismissals Act shall not apply if:*

- *(i) the contract is in writing;*
- *(ii) it was signed by both parties; and*
- *(iii) it contains a statement that the Act shall not apply to a dismissal consisting only of the expiry of the cesser aforesaid*

The formula is straightforward and must be followed. The conditions should be satisfied at the time the contract is made.

Without a waiver in the terms above, the Unfair Dismissals Act applies to all temporary contracts, requiring the employer to adduce substantial grounds to justify termination."

It is submitted that the Tribunal should adopt as correct the construction of the section contended for by Dr. Redmond, i.e. that the 'waiver' must be in place when the contract is entered into.

It is entirely normal for clauses of this nature, which purport to exclude liability and are commonly referred to as "exemption clauses", to be struck down by the Courts or Tribunals. Under the *European Communities (Unfair Terms in Consumer Contracts) Regulations,* 1995 clauses which purport to exclude liability are *prima facie* unenforceable.

At common law there are also special rules regarding the efficacy of "exemption clauses"; cf: *Chitty on Contracts 28th ed. Para 12-010.*

Even if the undated document could be construed as a renegotiation of the original contract it is clear that the exemption clause was not adequately brought to the attention of the claimant in line with what is referred to as the "red hand rule", formulated by Denning MR in *Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163* so that it is ineffective. In this jurisdiction the rule was endorsed by Costello P. in *Carroll v. An Post Lottery Company [1996] 1. I.R. 443*. This rule was expressly recognised recently by Mr. Justice Smyth in *Eamon Finnegan and J & E Davey, The High Court 26 January 2007* where Mr. Justice Smyth held that "*to enforce a condition it must be*

fairly and reasonably brought to the other party's attention".

The Claimant worked under a contract of employment for some months before the document relied on by the Respondent was introduced. The contract which the Claimant entered into with the Respondent and which she worked under did not include a 'waiver' and it is submitted that a 'waiver' must be in place at the time the contract is entered into to be effective.

In line with the jurisprudence of *Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163* it is incumbent on the employer where a clause is inserted into a contract of employment, which would have the effect of ousting the employee's statutory rights, to bring that clause expressly to the attention of the employee.

There is no evidence in this case that that was done, and accordingly the Respondent cannot rely upon the clause, if in fact it formed part of the contract at all.

For the reasons set out above the clause in the undated document has no effect and is not a valid waiver in line with Section 2(2) (b) of the Unfair Dismissals Acts, 1977 to 2001. In the premises the Respondent must show that there were substantial grounds justifying the Claimant's dismissal and those grounds cannot merely be the expiry of the contract, cf. *Fitzgerald -v – St. Patrick's College Maynooth, Kerr & Madden P116.*

And in the premises, the submissions by counsel for the Respondent that there is no "dismissal" at the end of a fixed term contract, are entirely without foundation.

Respondent's case before the Tribunal:

For the Respondent it was argued that the Claimant did not refuse to sign the contract. Her status changed when she signed the contract. The contract was signed after Christmas 2006, but the Act does not say when the waiver must be agreed. The contract was drafted by the school but was signed by the Claimant. The school is protected by the waiver. The termination of contract is not dismissal.

The Respondent stated that under 2(2) (b) of the Unfair Dismissals Act, 1977 the Tribunal does not have jurisdiction to decide on this case. It is not an exemption clause, it falls within the provisions of section 2(2) (b) of the Act. Much of case law presumes that the terms of a contract are received by an employee before they sign it, the legislation does not need to be explicit. They did not seek a blanket exemption, but only to show that the contract related to a fixed term. There is a principle in contract law that you are bound by what you sign *L'Estrange v. Graucob 1934 2KB 394*. It is clear that clause 6 of the contract is not uncommon or onerous, the Claimant knew of its existence and also knew that the job was coming to an end. It was accepted that the contract was signed after the commencement of employment.

Claimant's case before the Tribunal:

It was argued that the Claimant was on her third contract. The first year had been an ad hoc agreement. The Claimant signed the contract which contained the waiver after Christmas 2006, that is, after the contract was 'agreed'. Redmond says that contract will not apply if conditions

applied at the time of contract. The post was advertised, the Claimant took up the post but at no time did she agree to the waiver. It was never put to her that she would have to agree to a waiver. The Claimant did not agree to the waiver at the time the contract was entered into. Without a valid waiver the employer needs to show substantial grounds (UD 244/78).

The Claimant submitted that the clause is an exemption clause, and should have been brought to the Claimant's attention before she signed it. There was a history of the employee working with the Respondent for two years without a written contract. This onerous clause should have been brought to the Claimant's attention before the contract was signed. The document sought to change her terms of employment afterwards, and to insert the waiver into the contract. The effect of this contract was to obliterate two years service, thus she had no rights. The employer should be able to draw up the contract at the beginning of the employment. The Respondent accepted that the contract was signed after the commencement of employment. The contract was made when she started work in 2005, even though there was no written contract at that stage.

DETERMINATION

The determination of the Tribunal was as follows:-

Section 2(2) (b) of the Unfair Dismissals Act 1977 as amended states:

" This Act shall not apply in relation to a dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid."

The three conditions; that the contract be in writing, that both parties have signed it and that the agreement expressly excludes the benefit of the Unfair Dismissals Act; as set out in section 2 (2) (b) have been complied with by the parties in this matter and therefore binds them. It is not necessary that the waiver of employment rights permitted by this section be executed prior to the commencement of the performance of the contract in order that same be incorporated into the contract. The submission made by the Claimant in this regard is not accepted. It is often the case, albeit undesirable, that contractual terms are agreed between parties but are reduced to writing at a later stage. The Respondent submits that this was the case and that the Claimant knew from previous years that the contract was on a fixed term basis (although in previous years there was nothing in writing to this effect). The Claimant, on the other hand, denies that this was the case and submits that she was mid contract when she was requested to sign the waiver. However, sign she did and this has legal repercussions for her. She has not made any argument that she was pressurised unfairly or otherwise to so sign.

The submission by the Claimant that the contract law authorities on exemption clauses should apply is not accepted. Statute replaces common law in this regard and the Tribunal is bound by the provisions of the section 2 (2) (b) Unfair Dismissals Act 1977 as amended

There is no other limiting provision in Section 2 (2) (b) to suggest that the Tribunal should add a further criterion that a waiver executed under section 2 (2) (b) should be signed by the parties prior to the commencement of the performance of the contract. The Tribunal does not accept that same is necessary in order that the waiver be incorporated into the contract.

Accordingly, the claims under the Unfair Dismissals Acts, 1977 to 2001 and the Minimum Notice and Terms of Employment Acts 1973 to 2001, fail.

Authorities and Cases referred to:

Dismissal Law in Ireland, Redmond
European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995
Olley v. Market Court Ltd. [1949]1 K. B. 532
Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163
Carroll v. An Post Lottery Company [1996] 1. I.R. 443
Eamon Finnegan and J & E Davey, The High Court 26 January 2007
Fitzgerald -v – St. Patrick's CollegeMaynooth, Kerr & Madden P116
Chitty on Contracts 28th ed. Para 12-010
L'Estrange v. Graucob 1934 2KB 394

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)