EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employer UD931/2006

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

Employee

-v-

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. D. Hegarty
Ms. P. Doyle

heard this appeal at Cork on 11 October 2007 and 17 January 2008

Representation:

Employer: Mr. David Gaffney, Coakley Moloney, Solicitors, 49 South Mall, Cork

Respondent: Ms. Marie Levis, Impact, Father Matthew Quay, Cork

This case came before the Tribunal by way of an appeal by the employer against the Recommendation of a Rights Commissioner in the case of Employee –vs- Employer (Ref No: r-038985-ud-05/MMG).

For ease of reference the appellant is referred to as the employer and the respondent is referred to as the employee in this determination.

The determination of the Tribunal is as follows:

The Evidence

The employer is the Board of Management (BOM) of a primary school. The employee was a special needs assistant (SNA) in its school. SNAs, who are to be distinguished from resource teachers or learning support teachers, provide for the physical care needs of children that have certain disabilities/incapacities. At the relevant time all SNAs in the school were child specific rather than school specific. Special Education Needs Officers (SENOs) assess the children to decidethe requirement for SNAs in the individual schools and the officer's (SENO's)

decision is final onthe matter. It is not the SENO's role to decide who should be appointed to the available posts. It isthe BOM that appoints or dismisses the SNAs. The number of SNAs required in a school varies from time to time, depending on individual needs of the children attending the school. The Department Of Education and Science (DES) funds the special education needs programme, whichincludes the SNA programme, on the basis of the SENOs' decisions.

The employee commenced as an SNA in September 2002 under a contract for a specified purpose, providing assistance to one pupil (Pupil A). Her position at that time was full-time infant school day (FT isd), which is one hour shorter than the full school day (FT fsd). In 2003 a second pupil (Pupil B) was assigned to the employee and she was then working full-time, full school day (FT fsd). She signed a second specified purpose contract on 7 October 2003. Her contract provided:

> *This agreement is a Specified Purpose Contract within the meaning of Section 2 (2) (b) of the Unfair Dismissals Acts, 1977 (as amended), for a specified purpose, being the provision of Special Needs Assistants (sic) to pupils (two pupils named) at (name of school), or as directed by the Principal in accordance with Appendix A, 2.9.3, for so long as the pupil is a pupil in this school and is sanctioned by the Department Of Education and Science (DES) for Special Needs Assistance from time to time. The Unfair Dismissals Acts, 1977 (as amended) shall not apply to a termination of this contract by reason of the cessation of the said purpose, whether as a result of the discontinuing of DES sanction of the said Special Needs Assistants, the departure of the said pupil from the school.*

Due to the concern of DES about expenditure in the area a nationwide review was carried out on the provision of special education needs. Two SENOs reviewed the SNA provision in the school in early 2005. Prior to this review the school had 7 SNAs (5 FT fsd and 2 FT isd). Following the review SENO reduced the number of SNA posts in the school from 7 to 5. The SENO's decision, which was communicated to the school on 9 June 2005, stated:

> *Following the **SNA Review carried out on 30 May 2005** the school will have a total of **5** Special Needs Assistant Posts (4 FT fsd and 1 FT isd) plus 0 part-time hours to provide for the assessed special educational needs of children with disabilities with Special Educational Needs.*

A letter from DES to the chairperson of BOM/principal in June 2005 stated:

> *I refer to a review of SNA support in mainstream classes in your school, which was carried out earlier this school year.*
>
> *Your school was identified in that review as having surplus SNA support and an earlier letter from this Department informed you that the surplus support could be retained until the end of the school year.*
>
> *In our previous correspondence you were informed that discussions were ongoing with representatives of school managers and SNA staff on issues relating to the termination of contracts of surplus staff and that schools would be advised of the outcome of those discussions in due course. At this stage, discussions are continuing with representatives of school management and SNA staff on issues such as the nature and value of a compensation package for those SNAs whose employment will be terminated or whose hours are being reduced and the outcome will be relayed to those schools affected as soon*

as the discussions are completed.

In the interim school management are now required to make arrangements to identify and inform surplus staff that they will not be required from the beginning of the new school year. In order to assist school management in making decisions on the selection of surplus SNA staff the following guidelines should be utilised.

Cessation of a full time SNA post

The selection criteria for determining whose contract should be terminated will be on a last in first out (LIFO) basis, subject to the contractual position pertaining in schools. This means that unless the most junior SNA in the school has a written child specific contract that entitles her/him to remain in the school, her/his contract should be terminated on the basis that she/he is the most junior in the school in terms of length of service. If however the school has operated on the basis of employing all SNAs on the basis of child specific contract sand offered such contracts to the SNAs; it is the SNA who is attached to the child who has been identified as no longer needing the services of an SNA that should be released.

…

Reduction of a full-time SNA post to a part-time post

In cases which involve a reduction in the number of SNA support hours to individual children (e.g. where a full time SNA post is reduced to 12.5 hours or where 2 fulltime posts have been reduced to two part time posts), the issue of redundancy payments may or may not arise.

In the case of one full-time SNA post being reduced to a part-time post the option of remaining in employment in the school on a part-time basis should be offered to the SNA. If this option is not taken up a redundancy situation may arise.

…

In circumstances where 2 or more full-time posts have been reduced to part-time posts the schools should offer the SNA in question the option of voluntary redundancy. If the option is not taken up then each SNA should be offered the option of taking up the part-time post. If one of the SNAs takes up the option of voluntary redundancy the part-time hours available should be offered to the other SNAs whose hours are being reduced. Compensation for the loss of hours may apply subject to the outcome of the discussions outlined above.

In all cases where a school wishes to combine part time hours sanctioned for two or more children to form one full time post, the school must satisfy itself that the needs of the children for whom the part time support has been sanctioned could be satisfactorily catered for by one full time person.

…

Reduction in hours of a part-time SNA

The guidelines under this heading are not relevant to this case.

Because the SENO sanctioned only 5 full-time SNA posts (a reduction of two from the previous school year) and zero part-time hours for the year 2005-2006 the principal selected the employee and another SNA for redundancy because the pupils to whom they were previously respectively assigned on a full-time basis were only allocated "access to surplus" SNA support *viz* support to be provided by a number of the full-time SNAs, during their spare time, while their "specific" pupils were with the resource teacher. Pupil B (the other named pupil in the employee's contract) had been assessed as no longer requiring SNA support.

The principal informed the employee in or around 14 June 2005 that her employment would be ending at the end of the school year (on 31 August 2005). The following day the employee informed the principal that she was willing to work the reduced hours (allocated to Pupil A) but he told her that someone else would be providing that support. In a letter dated 28 June 2005 the Chairman of BOM formally notified the employee that her contract with the school was being terminated. The letter stated *inter alia:*

> *"The BOM were saddened to learn of the SENO decision to curtail (named child) hours and to re-allocate his remaining hours to surplus hours of other SNAs, thereby suppressing your position. In accordance with instructions from the DES, I am now giving you formal notice of the termination of your contract with the school on 31st August 2005".*

A document dated 17 June 2005 signed by a Senior Industrial Relations Officer of the Labour Relations Commission, was opened to the Tribunal:

> ***Department of Education & Science – IMPACT***
> ***Special needs Assistants***
>
> *The following proposals are being put forward on the basis that they are being recommended for acceptance by both parties.*
>
> 1. *Redundancy compensation of twice statutory terms to be applied. These terms to apply to employees with more than one year's service.*
>
> 2. *Compensation to those losing full time status and associated benefits to be applied on a pro rata basis. The operation of this arrangement to be reviewed after 12 months.*
>
> 3. *The parties agree to enter into negotiations at an early date with a view to devising a suitable system for redeployment having regard to the various complexities involved. It would be the objective that this process be finalised for the end of the next school year.*
>
> 4. *The selection criteria for redundancy will be the last in first out subject to existing contract arrangements. The parties acknowledge the possibility of circumstances which may fall outside of this criteria (sic). The Department of Education and Science to liaise with school management bodies with a view to resolving any difficulties which may arise. In the event of particular difficulties arising the Department and union will consider whether some further mechanism needs to be put in place to address these.*

In the event of these proposals being rejected they will be automatically withdrawn and have no status."

It was argued on behalf of the employee that this document constituted an agreement and that the employee had been selected for redundancy in breach of this agreement. A letter to this effect was sent to the school management subsequent to the employee's dismissal. This was the first the principal had heard of a purported agreement. When he contacted DES an official informed him that she was not aware of an agreement either and she forwarded him the document of 17 June 2005. It was the employer's case that the contents of the document of 17 June 2005 constituted a set of proposals and not an agreement. It was further the employer's case that the agreement reached between the representatives of school managers and SNAs on redundancy arrangements including selection criteria in respect of SNAs became effective when Circular 0058/2006 was issued to the schools in June 2006; the agreement which had been formalised in the circular in May 2006 had been concluded some time prior to that. DES regulates schools by means of Circulars, which contain instructions that all schools must follow.

Pursuant to Circular Letter SNA 15/05 (dated August 2005) all SNAs appointed from 1 September 2005 are to be employed under school specific rather than child specific contracts; those already in employment under child specific contracts and "*whose employment is continuing for the next school year"* (emphasis added) had the option of transferring to the revised contract, on or before30 September 2005 and their continuity of service for seniority would be preserved.

In September 2005 the principal requested a review of SENO's review of May 2005. Resulting from this request and because the school was opening a new unit for children with autism after the October 2005 mid-term further SNAs were sanctioned for the school - two for the new unit and a third to cater for the care needs of a number of pupils, including Pupil A. The claimant was interviewed by the panel, on 14 October 2005, in accordance with procedures set out in Circular SNA 03/03 for one of these positions but she was unsuccessful. The employee felt that she had lost a good job and a good pension. Had she been employed in the school in September 2005 she would have opted to transfer to the school specific contract and she felt that she would have been at the school until she retired. She had attended a course to care for special needs pupils.

Determination:

After careful consideration of the evidence in this case the Tribunal has come to a majority decision with Ms. Doyle dissenting. The majority finds that the LRC document of 17 June 2005 constituted a set of proposals and not an agreement. It is clear from the contents of DES's letters dated June2005 (precise date not specified) to Principals/Boards of Management referred to ongoing negotiation with representatives of school managers and SNA staff on some issues relating to thetermination of contracts of surplus staff (as a result of the review) and indicated that the schools would be advised of the outcome of those discussions once concluded. School managers did notreceive any such indication prior to the employee's dismissal. The majority is satisfied that theagreement on the redundancy arrangements for surplus SNAs only became effective when theDepartment of Education and Science issued Circular 0058/2006 on the matter to the schools inJune 2006. Accordingly, the majority finds that the dismissal in August 2005 was not in breach ofthe purported agreement. The subject matter of Circular Letter SNA 15/05 dealt with the newschool-specific contract, which governs the employment of all SNAs commencing employment onor after 1 September 2005 (including those exercising the option therein) and did not apply to thedecision to dismiss the employee for redundancy in August 2005. In any event the majority notes,having examined the document of 17 June 2005, the guidelines

outlined by the DES in its letter ofJune 2005, the instructions in the penultimate paragraph of Circular Letter SNA 15/05 and clauses 2and 4 of Circular 0058/06 that all clauses relating to the Cessation of a full-time SNA post aredrafted in almost identical language and all have similar effect ***viz*** the selection forredundancy/dismissal will be on a last in first out basis subject to the contractual arrangements inthe school; the greatest amplification of the procedure for selecting the SNA fordismissal/redundancy was in the June 2005 letter which was applied in the instant case (see below).These 4 documents also deal with the reduction of one full-time SNA post to a part-time post.

Three elements of the SENO's decision of 30 May 2005 are relevant to this case: the number of full-time SNA posts in the school was reduced from 7 to 5, there were to be "0 part-time hours" and 2 pupils, who in the previous years had been assigned full-time SNA support, were instead allocated "access to surplus" SNA support. The DES funds the SNA programme based on the SENO's decision. The combined effect of the first two elements of the SENO's decision was that two full-time SNA posts were redundant. The majority accepts that it was not open to the employer to appoint the employee as an SNA on a part-time basis.

It is clear from DES's letters of June 2005 that pending the conclusion of the national negotiations between the representatives of school managers and SNA staff that the surplus SNAs were to bedismissed or made redundant at the end of the 2004-2005 school year in accordance with the guidelines set out therein. Under the heading *Cessation of a full time SNA post it provided:*

The selection criteria for determining whose contract should be terminated will be on a last in first out (LIFO) basis, subject to the contractual position pertaining in schools. This means that unless the most junior SNA in the school has a written child specific contract that entitles her/him to remain in the school, her/his contract should be terminated on the basis that she/he is the most junior in the school in terms of length of service. If however the school has operated on the basis of employing all SNAs on the basis of child specific contracts and offered such contracts to the SNAs; it is the SNA who is attached to the child who has been identified as no longer needing the services of an SNA that should be released.

The 7 SNAs in the school at the time of the SENO's decision were employed under child specific contracts. Of these 7 SNAs, 5 were assigned to provide full-time care to their respectively assigned pupils and the two pupils who were formerly respectively assigned to the employee and to one other SNA were no longer allocated full-time SNAs but were allocated a reduced number of carehours which were to be provided "by access to surplus" *viz* would be provided by the full-time SNAs in their spare time while their respective assigned pupils were with the resource teacher. Pupil B who was the other named pupil in the employee's contract was not allocated any care hoursin the SENO's decision. In these circumstances the majority finds that the employer's decision notto apply LIFO and to select the latter two SNAs (the employee being one) for redundancy was reasonable and fair. The majority finds support for its conclusion in the final sentence in the DES'sguidelines (see previous paragraph).

The majority considered the employee's contention that, under her contract of employment, she was entitled to remain as a special needs assistant in the school *for so long as the pupil (Pupil A) isa pupil in this school and is sanctioned by the Department Of Education and Science (DES) forSpecial Needs Assistance from time to time*, in the context where the 6 other SNAs had a similarchild specific contractual term. The contractual relationship in this case is between the employeeand the employer/Board of Management of the school. The majority finds that a supervening event,the withdrawal of funding for two SNA posts by the DES, which was outside

the control of both parties, discharged the contract. As was pointed out in a landmark case on frustration, Krell v Henry [1903] 2 Kings Bench 740 at 748, frustration of contract is not restricted to physical impossibility of contract but also applies to "cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance". The non-availability of funding for the employee's post was such "a state of things going to the root of the contract and essential to its performance".

For the above reasons the Tribunal, by majority, finds that the dismissal was not unfair. Accordingly, the appeal by the employer under the Unfair Dismissals Acts, 1977 to 2001 succeeds.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)