

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

UD1038/2006

against the recommendation of the Rights Commissioner **R-038972-UD-05-DI** in  
the case of:

Employee and

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. J. Hennessey  
Ms. E. Brezina

heard this appeal at Kilkenny on 17 May  
and 4 September 2007

Representation:

Appellant: Mr. Denis Hynes, Branch Secretary, SIPTU, 18 Patrick Street, Kilkenny

Respondent Ms. Ger Moriarty, Local Government Management Services Board,  
Floor 2, Cumberland House, Fenian Street, Dublin 2

This case came before the Tribunal as a result of an appeal by the employee (the appellant) against a recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2001, **R-038972-UD-05-DI**.

For ease of reference in this case the appellant will be referred to as the employee and the respondent will be referred to as the employer.

The determination of the Tribunal was as follows: -

The employee commenced employment with the employer in 1967 as a part-time retained fire fighter, at a time when there was no age condition in the general terms of employment. In 1971 the employer included an age condition in its general terms of employment, requiring all new entrants to the fire service thereafter to retire when they reached 55 years of age. On 1 January 1993 the

employee was promoted to the position of part-time retained sub-officer. The employment was uneventful until the employer required the employee to retire on 15 November 2005 when he reached 60 years of age. The issue in contention between the parties in this case is the retirement age for the employee and whether the employee is eligible to bring a claim under the Unfair Dismissal Acts. During the employment there were negotiations at both national and local level in which the matter of the retirement age of retained fire fighters was an issue between the parties.

On the national level the issue of retirement age for the retained fire service dated back to around 1968 when there was an agreement in place between the County and City Managers Association and ICTU regarding the terms and conditions for retained fire fighters. One of the conditions introduced was the payment of a retirement gratuity at age 55, or at an earlier age if certified unfit for the work. There were ongoing negotiations between the unions and LGMSB throughout the 1980s and into the early 1990s on the issues of the amount of the retirement gratuity as well as the retirement age and compulsory medical examinations for retained fire fighters. The unions were seeking an increase in the amount of the retirement gratuity and management was prepared to look favourably on the claim subject to a number of conditions such as the enforcement of a retirement age at 55 years and compulsory annual medical examinations. In Labour Court Recommendation No. 12292 of 23 February 1989 both sides accepted a retirement age of 55 years for retained fire fighters. Nevertheless, the question of retirement age continued to be raised in a number of cases in various legal fora. In 2001 the unions submitted two claims seeking an increase in both the retirement age, from 55 years of age to 60, and in the retirement gratuity throughout the country. Pursuant to Labour Court Recommendation No. 17223 of August 2002 an expert group was established to consider the claim for an increase in the retirement age for all grades in the retained fire service: the group was to have due regard to domestic and EU legislation including health and safety requirements. The expert group reported on 16 April 2003. Its findings, which formed a binding collective agreement on the parties, were as follows:-

*“With the exception of the age limit in 2 below the following findings were agreed unanimously by the expert group. In the case of the extended age that decision was taken by the independent chairperson in line with the terms of reference of the working group.*

- 1. The preferred retirement age for retained fire fighters remains at 55. There are fire fighters who would be physically capable of working beyond the preferred age and who should have an extended optional period in which to exit the service subject to certain conditions. Such fire fighters should have the **option** to continue working for a defined limited period **subject to** compulsory medical assessment measured against agreed standards. Any significant change in a fire fighter’s medical condition during the extended period must be notified to the employer.*
- 2. The extended optional period would be to age 58. The extended period would apply on the same basis to all categories of fire fighters in the retained service.*
- 3. In practical terms these findings are to be implemented as follows:*
  - Sections 4, 5 & 6 relate to the medical requirements which need to be fulfilled*

*These terms apply to all retained fire fighters in all categories in the retained service in all local authorities with the exception of those retained fire fighters whose written contracts of employment specify a retirement age beyond age 55”*

Following arbitration on the question of the retirement gratuity the findings of the expert group were adopted in a circular from the Department of the Environment to all local authorities on 24 November 2003 and backdated to 26 April 2001.

The employee's position was that as he was employed before 1971, when retirement at age 55 had been implemented, his situation was not covered by this national agreement. The employer's position was that while the national agreement covered all retained fire fighters, on a national basis, including those who did not have a specified retirement age, it did not apply to the claimant or other retained fire fighters in its area who had joined the fire service prior to 1971 because this was covered by a local agreement reached in 1990 between the employee's trade union and the employer.

In 1971 and thereafter the employer imposed a retirement age of 55 on all new entrants to the fire service. In the latter months of 1989 the union branch secretary (UBS) entered protracted negotiations with the then County Secretary (TCS) on the retirement age for those retained fire fighters who had commenced employment prior to 1971 and did not have a specified retirement age (in their general terms of employment). Some of these retained fire fighters wanted to remain until they were 65 years of age but that was not acceptable to the employer. The employer wanted to impose a retirement age of 55 on these men but this was not acceptable to the union side. Ultimately the employer compromised and offered to implement a retirement age of 60 years with special provision for those retained fire fighters who had reached the age of 60 before 1 January 1990. TCS wrote to UBS on 9 February 1990 and set out the employer's position which is summarised as follows:

1. *Retained firemen who were not covered by an age clause in their condition of appointment to retire on reaching the age of 60.*
2. *In the case of retained brigade personnel not covered by an age clause who had already reached the age of 60 on 1.1.90, these men would retire on 30 September 1990.*
3. *Retained brigade personnel not covered by the age clause who reach the age of 60 after 1.1.90 to retire at the end of the quarter after reaching the age of 60.*
4. *All retained brigade personnel whose conditions of appointment was covered by an age of retirement clause to retire on reaching the age of 55.*
5. *In the case of Mr. J. Wall, Driver, Callan brigade and Mr. J. Shalloe, Fireman, Castlecomer Brigade, both of whom are covered by the age clause in their conditions of appointment and who will reach 55 in the current year, it is proposed that they also should retire on 30<sup>th</sup> September.* ...

*As a condition of the implementation of the retiring arrangements as indicated above, the Council would require that the annual medical examination be extended to all retained firemen, irrespective of age. I wish to point out in this context that recent legislation on Health, Welfare and Safety which has been implemented by the Minister for Labour places on all employers, including local authorities, increased responsibilities with regard to the safety of their employees. As you are aware, under this legislation all employees are required to prepare a Safety Statement. The Council is satisfied that regular medical examinations of all retained firemen is an essential feature of its responsibilities under the legislation.*

*I would be grateful if you would let me have your response on this matter as soon as possible. Finally, you will note the Councils proposals for recruitment in 1990, which are set out on each brigade schedule. These cover the retirements and in some instances the increasing of the strength up to the Councils assessment of the needs in each area. As was pointed out at the meeting, this*

*recruitment cannot go ahead until the question of the retirement age has been resolved.*

The employer's offer as set out in the letter of 9 February 1990 had been on the table for a long time and the employer had been pressing for a response as evidenced in letters of 1 May, 30 May and 31 July 1990 from TCS. On 2 August 1990 UBS wrote to the newly appointed section secretary (NS) (now deceased) to the Kilkenny firemen seeking the member's response. UBS had eventually got word that the offer had been accepted and he informed the employer. There was no ballot on the 1990 agreement. The employer's position was that while it was normal practice to hold a ballot this was not always the case. UBS had been told that some were unhappy that the retirement age was 60 but he had fought their case and the best he could get was a retirement age of 60. He had not been made aware of any objection to the agreement. The employer implemented the enhanced gratuity as part of the 1990 agreement. In late 1990 the employer also held recruitment interviews to replace those retained fire fighters who would be retiring that year under the agreement. In a letter of 26 April 1991 TCS set out the details of 1990 agreement, relating to the retirement age and the compulsory annual medical examination for retained fire fighters, to the new Branch Secretary (NBS); UBS had been replaced as Branch Secretary at the end of 1990. The employer's position was that neither NBS nor anyone else contradicted the contents of this letter. UBS was satisfied that both sides had reached agreement on the issue and that they had been negotiating on behalf of all grades within the retained fire service. TCS told the Tribunal that all retained fire fighters, at whatever grade, are employees, as distinct from officers. The agreement was not in writing.

The employee's position as to the existence of the 1990 agreement was to the contrary. The former shop steward (FS) and later section secretary of the retained fire fighters told the Tribunal he had been involved in a number of negotiations on different issues, the most controversial being the intention of the employer to implement a compulsory retirement age of 55 years. When he was replaced as section secretary in June 1990 he briefed his successor (NS) (now deceased) on what had been going on over the previous years. He advised him that there was no mandate to accept the retirement age of 60 and that there had not been any vote on it or on the issue of the medical examinations. He had not been asked for advice by a former employee (OO) when he took his case to the Circuit Court; they worked in different fire stations and he was not aware that he was taking a case. The minutes of the trade union meetings in both 1989 and 1990 were opened to the Tribunal. FS maintained that there was no agreement and that only proposals were discussed at the meetings. He had not raised issues when reference was made to an "agreement". He agreed that that the minutes of the union meeting of 18 June 1990 show that there was discussion and reluctance to agree on the compulsory medical examination for over 55 year olds.

The employee's position was that when he joined the fire service in 1967 he was told that if he fitted in he would be there until he was 65. While accepted that there was a proposal to change the retirement age, there had not been a ballot about it. If there had been a ballot he would have opposed it, even if the union accepted it, as he did not want to lose five years wages. He underwent medical examinations because he was told that the respondent would not otherwise employ him. For him the medical examination was something totally different because firemen had to be medically fit. Some years after joining the fire service the employee saw the letter/notice from the former Chief Fire Officer stating that the retiring age was 55 years but that it was extended to 65 years for officers. He felt that his retiring age at 65 years was copper-fastened when he became a sub-officer in 1993.

The employer's position was that the implementation of the agreement had gone smoothly. None of

the six retained fire fighters over age 60 in 1990 raised an issue, either through the union or otherwise, about their retirement. Of the thirteen others affected by the agreement, one had yet to reach 60 years of age and all the others apart from the employee and one other (OO) had retired without argument in accordance with the terms of the agreement. OO retired at 60 years of age in 1991 and later contested his retirement age in the Circuit Court. His case was dismissed.

Notwithstanding the report of the expert group in April 2003, which was binding nationally on local authorities and fire fighters and imposed a retirement age of 55 years with the option to remain on until 58, the employer honoured its local agreement of 1990 with the union. The chief fire officer (CFO) wrote to the claimant on 4 December 2003, following implementation of the national agreement, in the following terms:

*“As you are aware the retirement age for fire fighters had been increased from 55 years to 58 years subject to passing a medical examination. This is agreed nationally between management and the unions*

*However as we have a local agreement with those fire fighters that joined the fire service pre 1971, that they could retire when they reached the age of 60 we will be honouring this commitment. Your employment would be subject to the normal occupational health system for the fire service as agreed with your union.*

*Should you have any queries please do not hesitate to contact me.”*

There was a dispute between the parties as to whether the employee responded to this letter or contacted CFO regarding his retirement age. CFO wrote to the employee again on 24 June 2005 notifying him that he was due to retire on 15 November 2005, the day on which he turned 60 years of age. Whilst CFO could not recall receiving the letter dated 2 August 2005 from the employee in which he asserted that his retirement age was 65 years, a senior executive officer of the Human Resource Section of the employer wrote to the employee on 30 August 2005 disavowing this assertion and asking him to produce any documentary evidence to the contrary that he might have. The employee produced no such evidence. An examination of the respondent's files and records did not reveal any documentary evidence in support of the employee's assertion. The employee retired on 15 November 2005 and accepted an enhanced gratuity in line with the national agreement.

### **Determination:**

Having carefully considered the evidence in this case the Tribunal accepts the evidence of the Union Branch Official (UBS) that a local agreement was concluded between the employee's trade union and the employer in 1990 to the effect that the retired fire fighters who had joined the employer's fire service prior to 1971 would retire at 60 years of age. Whilst it was common case that the agreement was not in writing and that a ballot was not held on the proposals set out in the letter of 9 February 1990, the Tribunal finds support for its conclusion that there was a local agreement in the subsequent retirement of those affected by the 1990 agreement, on reaching their 60<sup>th</sup> birthday, and in the employer's recruitment drive to replace them which was conditional on agreement having been reached between the parties. The Tribunal finds further support for its conclusion in that the details of the agreement, set out in the County Secretary's (TCS's) letter of 26 April 1991 to the new Union Branch Official (NBS), were not contradicted. While there was much controversy between the parties on the use of the terms "proposals" as distinct from "agreement" in the minutes of the trade union meetings it is clear from the Union Branch Secretary's letter of 2 August 1990 to the new

section secretary (now deceased) of the trade union that the agreement was reached after that date and after the latter's election/appointment to that position in the union. Finally, according to the minutes of the trade union meeting of 29 August 1990 one member told the meeting that the Union Branch Official had informed him that the employer/county council was the only council, that he was aware of, that had an agreement, albeit a verbal one, with retained fire fighters under which they could remain in the fire service until they were 60 years of age and in all other county councils the retained fire fighters had to retire on reaching 55 years of age.

The employee was an active member of his trade union. The minutes of the trade union meetings of 1990 produced in evidence refer to a retirement age of 60; however, the only concern expressed by the employee was in relation to the medical examination. The Tribunal is satisfied that the employee was aware of the 1990 local agreement and consented to it. The Tribunal in distinguishing this case from the decision of Flood J in the High Court in *County Council of Donegal v Porter and Ors* [1993] ELR 101 finds that while the employee initially had an expectation to remain in employment with the respondent fire service until he reached 65 years of age this expectation was altered by the local agreement that had occurred in the intervening years. Similarly, the other cases cited in support of the employee's case were not relevant because of the existence in this case, as distinct from those cited, of the local agreement between the parties which had altered the employee's original contractual situation. Finally, in undergoing the compulsory annual medical examinations and accepting the enhanced gratuity, the claimant was abiding by the conditions of the agreement.

The local agreement was relevant to the employment in this case. Accordingly, the Tribunal does not have to consider the national agreement as it had no application in this case.

For all these reasons the Tribunal is satisfied that the employee's retirement age was 60 years. Accordingly, the employee having reached the normal retiring age in the employment, the Tribunal upholds the Rights Commissioner's recommendation and the appeal under Section 2 (1) (b) of the Unfair Dismissals Act as amended fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)