

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO.
RP596/2006
UD1169/2006

MN766/2006

Against

2 Employers

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. M. Forde
Mr D. McEvoy

heard this claim at Killarney on 6th December 2007

Representation:

Claimant:

Mr. Paul Depuis, Assistant Organiser, S I P T U, Connolly Hall, Upper Rock Street, Tralee, Co. Kerry

Respondents:

Ms. Miriam O'Sullivan, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Preliminary Issue

The respondent raised preliminary issues as to whether the claimant had the requisite service to institute either an unfair dismissal claim under the Unfair Dismissals Acts or an appeal under the Redundancy Payments Acts.

The respondent supplies meat products to the retail trade. There are four main departments in its business. The respondent's *Ready To Cook* department

produces product for the U.K. market. Its *Consumer Packing Department* provides meat joints to some of the main retailers in the Irish Market; demand for these products is driven by promotions in the stores and holiday periods. Due to the nature of the workload the respondent employs many workers on temporary contracts to cater for the increased demand in the holiday periods and the promotions in the main retailers.

The respondent employed the claimant under a number of temporary contracts. He was first employed by the respondent in the *Consumer Packing Department* from 3 April 2003 to cater for the Easter promotions. Once these were completed the claimant was transferred to the twilight shift in the *Ready To Cook Department*. When the respondent lost a UK customer there was no longer need for the twilight shift. However, because of promotions and the Christmas demand the claimant was transferred back to the *Consumer Packing Department* where he worked until 7 January 2005. By letter, dated 16 December 2004 the claimant was notified that his employment with the respondent was being terminated on 7 January 2005 and his P45 was later issued. The claimant next worked with the respondent under a temporary contract from 16 February 2005 to 11 March 2005 when one of the respondent's customers wanted to increase volumes in sales. On this occasion the claimant's employment was terminated when the respondent could handle the demand without the temporary workers. The claimant was given notice by letter dated 7 March 2005 that his employment was being terminated on 11 March 2005 and his P45 was later issued. The claimant's third period of employment with the respondent ran from 29 July 2005 to 3 January 2006 to cater for promotions, the August bank holiday and the Christmas period. By letter, dated 29 December 2004 the claimant was notified that his employment with the respondent was being terminated on 4 January 2005 but due to an oversight a P45 was not issued to him on that occasion. The claimant's final period of employment with the respondent was from 7 March 2006 to 15 May 2006, to cater for the promotions and the increased demand for both the St. Patrick's and Easter weekends. By letter, dated 8 May 2006, the claimant was notified that his employment with the respondent was being terminated on 15 May 2006 and his P45 was later issued. At the beginning of each employment a written temporary contract of employment was signed both by the claimant and on behalf of the respondent; apart from the first contract, there was no stipulation in the contracts that the Unfair Dismissals Act was not to apply to a dismissal at the expiry of the contracts.

It was the claimant's case that up to 2006 re-employment was on the basis of seniority from a panel of temporary workers but this changed in January 2006 because he and some others raised concerns (which were reported in the media) about the respondent's taking on six temporary foreign nationals within a week or ten days of dismissing six temporary Irish workers. In March 2006 a number of temporary workers, who had less seniority than the claimant on the panel were re-employed before him and he was the first to be let go in May 2006. He was not taken back in June or July when others with less service than he had were taken back. He would have been next in line for permanency. When a shop steward raised the claimant's situation with the Operations Manager he told him that the claimant would not be coming back and no explanation was given to him for this. It was the respondent's case that it would not countenance placing temporary staff on a seniority list and that employment of temporary staff was on the basis of suitability and availability; the

respondent had a file of applications and interviewed applicants on an ongoing basis; in order to add to the pool of available and experienced workers new suitable temporary applicants were given a chance along with those who had previously worked for the respondent.

It was the claimant's case that the purpose of the series of contracts was to avoid liability under the Unfair Dismissal Acts and that by not renewing his contract of employment in mid 2006 when others with less seniority than he had were taken on he was dismissed. The claimant further contended that because dismissal after each period of temporary employment was followed by re-employment within 26 weeks, he has two years reckonable service and is entitled to a redundancy lump sum payment under the Redundancy Payments Acts.

The respondent contended that: (i) the breaks in the claimant's employment were not for the purpose of avoiding liability under the Unfair Dismissals Acts, (ii) the claimant was employed on each occasion on a discrete temporary contract, (iii) this was a legitimate employment practice due to the very fast rate of change in the volumes of product being processed within the area in which the claimant worked, and (iv) that this employment practice had been accepted by the claimant's trade union. The respondent, accordingly, contended that the relevant period of employment for the purposes of making a claim under the Unfair Dismissal Acts or the Redundancy Payments Acts is 7 March 2006 to 15 May 2006 and that, therefore, the claimant does not have the requisite service to bring a claim/appeal under either the Unfair Dismissals Acts or the Redundancy Payments Acts. The respondent took on the extra workers on a temporary basis because the business was in trouble and it could not guarantee permanency. It had 150 employees in December 2006. It made 40 permanent employees redundant since January 2007 and at the time of the hearing of this case it was in negotiations with the trade union to make another 50 of its permanent employees redundant. Between January 2007 and December 2007 temporary workers were not employed. In December 2007 some temporary workers were employed to deal with seasonal demand. From 31 January 2008 the respondent expects to be down to 30 employees.

Determination

The Tribunal is satisfied that the purpose for entering into a series of contracts was to cater for the increased demand for the respondent's product at holiday/seasonal times as well as for promotions by some of the larger stores and that accordingly it was a genuine reason and was neither wholly nor partly for the purpose of avoiding liability under the Unfair Dismissals Act 1977 as amended, nor was it connected therewith. In particular, the Tribunal finds that the series of contracts under which the claimant was employed do not come within the provisions of section 2 (2) (b) of Act of 1977 as inserted by section 3 (b) of the Unfair Dismissals (Amendment) Act 1993.

The Tribunal further considered section 2 (5) of the Unfair Dismissals Act 1977 as inserted by section 3 (4) of the Unfair Dismissals (Amendment) Act 1993. This section which deals with continuity of employment where there has been a dismissal

of an employee who had been employed under an open-ended contact of employment, followed by re-employment by the same employer within 26 weeks of the dismissal and the dismissal was wholly or partly for or in connection with the avoidance of liability under the Unfair Dismissals Act 1977 as amended. The Tribunal similarly finds that the section 2 (5) has no application in this case.

For the above reasons the Tribunal finds that the relevant period of employment for the determination of the preliminary issue under the Unfair Dismissals Act is the claimant's period of employment from 7 March 2006 to 15 May 2006, which is less than one year's continuous employment. Accordingly, the Tribunal has no jurisdiction to hear a claim under the Unfair Dismissals Acts 1977 to 2001.

Schedule 3 of the Redundancy Payments Act 1967 as amended sets out how to compute continuous service. Paragraph 5A as inserted by section 19 of the Redundancy Payments Act 1971 provides:

If an employee is dismissed by reason of redundancy (emphasis added) before attaining the period of 104 weeks referred to in section 7 (5) (as amended) of the Principal Act and resumes employment with the same employer within 26 weeks, his employment shall be taken to be continuous."

The dismissal in this case is by way of cesser of purpose, which is a distinct statutory concept from redundancy, as applies in the above paragraph. The parties in this case arranged their working relationship on the basis of a series of specified purpose contracts rather than on an ongoing employment relationship with a possibility of lay-offs or redundancy. The Tribunal has given the above interpretation to paragraph 5A while being aware that the combined effect of section 7 of the Redundancy Payments Act 1967 and section 9 (1)(b) of the said Act as substituted by section 6 of the Redundancy Payments Act 2003 is that a dismissal by way of the cesser of the (specified) purpose is recognised for purposes of entitlement to a lump sum redundancy payment. Furthermore, there is no provision in the Redundancy Payments Acts for adding together the terms of a series of specified purpose contracts. The Tribunal determines that the relevant period of employment is that which ran from 7 March 2006 to 15 May 2006. Whilst the Tribunal heard no argument as to whether a redundancy situation existed in this case the claimant has not the requisite two years' service to lodge a redundancy appeal. The appeal under the Redundancy Payments Acts, 1967 to 2003 fails

The claimant received a week's notice of the termination of three of his contracts of employment. As regards the contract, which ran from 16 February 2005 to 11 March 2005 the claimant only received four days notice of its termination. As the claimant had not worked thirteen weeks under this contract there is no statutory entitlement to notice or to payment in lieu. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)