

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD742/2007

against
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
Mr. D. McEvoy

heard this claim at Cork on 3rd April 2008

Representation:

Claimant: Mr. Eugene Quinn A.G.S., P.S.E.U., 30 Merrion Square, Dublin 2

Respondent: Mr. Micheál P. O. Mulláin, O'Flynn Exhams, Solicitors, 58 South Mall, Cork

The determination of the Tribunal was as follows:

Preliminary Issue:

At the outset of the hearing the respondent's representative raised the preliminary issue that the respondent was not the claimant's employer.

The Evidence

FAS was formed in 1988 and it brought together a number of agencies and a section of the Department of Labour. Approximately four hundred and fifty people, including the claimant, transferred from the Department of Labour to FAS. In May 1991 the claimant applied for a promotional post in FAS, was successful and was designated a staff member of FAS by the Minister for Labour. In 1996 the claimant applied by way of open competition for the position of co-ordinator of the Local Employment Service (CCLES) with the respondent. The claimant was successful in his application. At the claimant's request FAS facilitated his appointment with the respondent by way of a secondment arrangement. FAS drew up a formal contract of secondment with the respondent, which was conditional on the claimant's acceptance of the terms of the letter

of contract issued to him by FAS on 10 January 1998. The claimant agreed and signed the letter of contract.

Throughout the period of secondment FAS paid the claimant his normal salary and decreased its subvention to the respondent by that amount. The claimant also received an allowance (initially €3,000 and over the course of the secondment rose to €3,800) for additional responsibilities assigned to him by the respondent; this was to be paid by FAS and recouped from the respondent. The claimant received the same increments that FAS staff received throughout the secondment and his defined pension benefits were maintained; this does not apply to the respondent's employees. The period of time he was on secondment is reckonable for his pension from FAS. At the time the secondment arrangement commenced the claimant was a Grade 8 in FAS and his grade was maintained throughout the period of the secondment. He was eligible to apply for promotion within FAS throughout the period.

The claimant spent eleven years in the position of Co-ordinator of CCLES and during this time he was answerable to the Chief Executive Officer (hereinafter CEO) and he also reported on a monthly basis to the Management Committee of CCLES. He oversaw the implementation of the Local Employment Service Management Committee and brought the service to a very high standard: CCLES was awarded the FAS Excellence Through People. He represented the respondent on other bodies. In 2003 he took on responsibility for that aspect of the respondent's work involved with Services for the Unemployed. He was involved in networking on behalf of the respondent. When FAS decided to close the Job Club he was involved in processing the appeal to FAS. In October 2005 a new CEO was appointed and she took on that task.

Around early 2007 with the Board's approval CEO wrote to FAS, advising of the respondent's intention to terminate the secondment arrangement and seeking its agreement to the termination. CEO met with the claimant on the 15 February 2007 to inform him of the decision. FAS agreed to facilitate the respondent's request to discontinue the secondment arrangement subject to the respondent's giving the claimant a reasonable time to disengage from his duties. CEO subsequently wrote to the claimant on the 4 April 2007 confirming the decision. FAS made arrangements for the claimant to report to FAS for work on 21 May 2007. CEO took on the role of Co-ordinator as of that date.

The claimant did not return to Fás on the 21 May 2007 but instead continued to occupy his office at the respondent's premises as if the secondment arrangement was continuing. This situation continued until November 2007, causing distress and unease among the staff and presenting the respondent with a difficult situation. During this time CEO wrote to the claimant a number of times to advise him that the secondment arrangement was completed. The respondent threatened injunction proceedings and, shortly after this, on the 19 November 2007, the claimant returned to FAS.

CEO accepted that she did not inform the claimant of the reasons for terminating the secondment arrangement. When she was seeking the Board's approval for the termination of the secondment arrangement she told the Board that she considered it to be in the best interests of the company because the relationship between the claimant and the respondent had deteriorated and the claimant's management of staff presented difficulties for the company. Such matters were not brought to the claimant's attention because he was not an employee.

During cross-examination the claimant confirmed he had entered a contract of employment with Fás in 1988 and that he subsequently signed the secondment agreement in January 1998 which

outlined the pay conditions and that notice could be given to him regarding the termination of the secondment arrangement. The claimant confirmed that he is an employee of FAS but added that he is also an employee of the respondent.

The end of the secondment was unexpected and the claimant told FAS that the matter was in dispute. The claimant also asked the respondent for reasons for terminating the secondment agreement but he was not given an explanation. The claimant was surprised at CEO's evidence concerning his performance as he had been rated highly for his staff management in previous performance reviews. FAS ceased paying the claimant's salary in October 2007 and this was a factor in his returning to work with FAS. In cross-examination the claimant accepted that he was an employee of FAS and that he had been made aware of promotions within FAS through the intranet and applied for some of these during the period of his secondment.

Determination:

When the claimant was successful in his application for the position of co-ordinator of the Local Employment Service with the respondent he did not seek leave of absence from the respondent but rather requested to be seconded to the respondent.

FAS seconded the claimant to the respondent under a secondment agreement. The initial period of secondment was from August 1996 to 31 July 1998 and thereafter the secondment arrangement was continued as before on an informal basis and all the terms and conditions of the secondment remained in force. The claimant accepted in his evidence that he was an employee of FAS. The Tribunal also notes that the claimant has returned to FAS since November 2007 and is continuing in his original permanent employment.

From the evidence adduced the Tribunal finds that the respondent is not the claimant's employer. Accordingly, the Tribunal has no jurisdiction to hear the claim against the respondent.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)