

EMPLOYMENT APPEALS TRIBUNAL

Claims of:
Employee
MN765/2006

Case No.
UD1167/2006

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr G. Phelan
Dr. A. Clune

heard this claim at Limerick on 30th January 2008 and 22nd April 2008

Representation:

Claimant: Ms. Karen O'Driscoll B.L. instructed by Mr. Cormac O' Hanlon,
J.W. O'Donovan, Solicitors, 53 South Mall, Cork

Respondent: Mr. Chris O'Donovan, IBEC, South West Regional Office,
11/12 Mill Court, The Diamond, Donegal Town

The determination of the Tribunal was as follows:

Respondent's Case:

The Tribunal heard evidence from the human resource manager of the respondent, which is a college. The witness explained that the college operated an annual research award system whereby staff could apply for a leave of absence and the college provided funding. The college made two awards the first year and one per year after that although one year no award was made.

The year spanning 2003-2004 two awards were made and one of these was to a Mr. D. Following Mr. D's award they advertised to fill his position. The witness served as a secretary to the interview boards and to the short-listing boards. In mid June 2003 they offered the position to the claimant. The witness explained that he did not have any meetings with the claimant but he did recall a telephone conversation and it would have been normal for him to phone as the claimant may have had questions. The claimant returned a form of acceptance. The witness was asked about any "contrivance" and he replied "No" and that the only vacancy was to replace

Mr. D, and it was not his practice to bring someone to the college on pretence. The claimant was not paid for July or August 2004, his role that term ceased on 30th June 2004.

The second position that the claimant had was to support the Irish studies centre. This was a new position and was for one year. The post was advertised and similar to the previous post there was an interview board. The claimant was successful. The witness was asked about the contract and if there was a contrivance or if he had “knowledge of further contracts.” The witness answered that there was no attempt to circumvent the Unfair Dismissals Act and “I cannot say (that there was) no other vacancy, my reason for saying that, is a Fellowship is normally awarded a year in advance so I would have it in my head”. The witness replied “No” when asked if he assured the claimant that there would be a future position for him.

The third contract that became available arose yet again because of a Fellowship: Specifically Dr. M obtained a Fellowship. The post was advertised and similar to the previous post there was an interview board. The claimant was successful in obtaining the post (Letter of appointment dated 19th September 2005 was opened to the Tribunal).

In the spring of 2006 the college advertised two posts for the Department of English. One of the posts was a permanent post and the other was a part-time post, which was replacing the Fellowship post. The claimant applied for the permanent post and was not offered the post, as he was second on the panel for the position. The claimant’s contract came to an end because Dr. M returned from his Fellowship.

Cross-examination:

It was put to the witness (in the context of comparing two contracts) if the posts were similar types of employment and he denied that this was the case. In answer to another question the witness explained that he was not in a position to comment on the claimant’s day-to-day duties.

When asked about what involvement the Head of the Department had (regarding the permanent post), the witness replied, “when I had become aware of a vacancy, e.g. there would be discussions about the advert... There is a rule that no offers of employment are offered until the governing body meets and rules.”

He was asked if the head of the department had a preference or a view (about who should be appointed) that it would “carry weight”. The witness replied “not necessarily”.

In answer to questions from the Tribunal the witness explained that if a permanent vacancy arises the Respondent would advertise the vacancy publicly and if the post were a contract post they would also advertise the post.

Arising:

The witness was asked if he was in a position to promise the claimant (a position). He explained that he would not and that he would not have known in 2003 that the position would arise in 2006, he had no authority to promise and no one in the college had the authority to promise the claimant the permanent position.

The Tribunal heard evidence from the Head of the Department. He explained that the initial post was a new post. He explained the work that the claimant did. The witness told the Tribunal that

he was not in a position to promise the job that arose in 2006. He was asked if he did actually promise the claimant the position and he replied, "No, I said he had a good chance". He explained that they interviewed five people and three of these were internal people. He told three people that he could see very good reason to give any of them the job. The final outcome was that none of the candidates got the job and this was not his wish, (that one of them were not chosen).

Dr. M is a lecturer in the English Department since 2002. In 2003 he received a telephone call from the claimant, whom he had first met in 1999. The claimant expressed to Dr. M that he was interested in the position as advertised.

Dr. M was delighted when the claimant applied for the post and he was supportive but he was not in a position to make the claimant permanent. During the claimant's recruitment process he visited with Dr. M. Dr. M had some conversations with the claimant concerning the future retirement of his colleague.

During cross-examination it was put to the witness that after the claimant's interview for the position, the Head of the Department had telephoned Dr. M and told him "it was in the bag" for the claimant. Dr. M accepted this but said he did not have the authority to promise the position to the claimant.

Answering questions from the Tribunal, Dr. M stated he was surprised and disappointed when the claimant was not the successful candidate but there was no guarantee he would be, as it was an open competition.

Claimant's Case:

The claimant outlined his qualifications for the Tribunal. In 2003 he held a full-time, permanent post in the English Department of the University of Aberdeen. However, he was interested in the advertised position with the respondent. It occurred to the claimant that the contract was for a shorter length than is usual in academia. The claimant contacted Dr. M and enquired what he knew of the position. Dr. M confirmed to the claimant that the contract was for a period of ten months but that a colleague would be retiring in the coming years. Dr. M instantly coupled the ten-month post to his colleague's retirement.

Dr. M also arranged a conversation with the Head of the Department for the claimant. The claimant enquired from the Head of the Department whether or not the contract was for ten months. The reply he received was that "it is a ten-month contract but not a ten-month contract."

The claimant had a number of further conversations with Dr. M and the Head of the Department and they were keen to establish to him that they had a plan. They also discussed with the claimant the long-term strategy for the Department. The claimant was flattered as they outlined to him how much he could bring to the Department. It was clear to the claimant that the post would not be closed off after ten months but was long-term. The Head of the Department told the claimant that if he accepted the ten-month position he would replace the retiring colleague upon his retirement. He told this to the claimant approximately three weeks before the closing deadline for applications. The claimant stated that without such discussions he would not have given up a permanent, pensionable post for a ten-month contract.

The claimant confirmed that during the interview process he and his family stayed with Dr. M who

spoke to the claimant regarding the future of the Department. It was the claimant's impression that Dr. M believed that the Head of the Department could make anything happen. The claimant attended the interview and returned to Dr. M's house. Dr. M subsequently received a text message on his mobile phone from the Head of the Department telling him that, "the eagle has landed."

The claimant returned to Aberdeen and during the next few weeks he received a letter from Human Resources confirming that he was the successful candidate for the post. The claimant had some time to consider the position and he also had further discussions with Dr. M.

The claimant commenced his teaching post in 2003. His role included day-to-day teaching duties and he commenced research projects that would take a year or two to complete. The claimant outlined to the Tribunal various other duties he undertook.

The claimant recalled a specific conversation with the Head of the Department approximately six months into his first contract. The claimant enquired if their colleague was definitely retiring. The Head of the Department replied in the affirmative and said he had worked out an exit strategy.

The claimant received a second contract for the academic year of 2004/2005. The claimant continued with developing the research aspect of his role and he continued with the administrative role as in 2003. There were direct connections between his first and second contract.

The 2004/2005 contract ended on the 31 August 2005. The claimant received a third post this time replacing Dr. M. It seemed to the claimant that everything the Head of the Department had said was coming true.

In early 2006 the claimant's colleague announced his intention to retire. The claimant again considered that what the Head of the Department had told him was coming true. The position was advertised and the claimant submitted his application. He was called to interview in June 2006.

After the interview the Head of the Department did not contact the claimant as he usually did. The claimant attempted to contact him but his call was unanswered. However, he spoke to the Head of the Department at a later date and the claimant asked him what had gone wrong.

The claimant wrote an email dated 25 July 2006 to the Head of the Department outlining the situation. The claimant wanted the Head of the Department to contact Mr. H who was his line manager. The claimant was absolutely furious at this stage. The claimant continued to email the Head of the Department but he did not receive much of a response. The Head of the Department subsequently copied a letter to the claimant that he had sent to other Heads of Departments. No response was received.

The claimant and the Head of the Department met. The Head of the Department spoke to the claimant about the letter he had circulated and about how he intended to raise the matter at a meeting. The claimant later found out that there was no meeting scheduled. He believed the Head of the Department was stalling.

The claimant gave evidence relating to his loss.

During cross-examination it was put to the claimant that he had previously left a permanent position to take a fixed-term contract and he confirmed this.

There was a three-week period between the advertisement and the claimant submitting his application and it was the claimant's contention that it was during this period that the first promises were made to him.

It was put to the claimant that it was normal for the Head of the Department and Dr. M to discuss long-term strategies. The claimant stated it was not normal for long-term strategies to be discussed with a staff member who had a ten-month contract. The claimant accepted that he had never received anything in writing from either Dr. M or the Head of the Department concerning his future but it was stated to him emphatically that it was not just a ten-month contract.

It was put to the claimant that the Head of the Department did not have the authority to make assurances. The claimant replied that due to the position that the Head of the Department held the claimant believed his assurances.

Answering questions from the Tribunal the claimant stated that the Head of the Department had discussed with him how he would fit into their retiring colleague's role. The claimant and the retiring colleague had similar academic interests and the claimant would have been compatible as a replacement for him.

Mr. D gave evidence to the Tribunal that he first indicated to the respondent his intention to resign in or around 2000/2001. He also had a number of conversations with the Head of the Department. It is Mr. D's view that the Head of a Department has a certain ability to shape a Department. Mr. D thought that the Head of the Department would have some influence concerning the filling of posts in the Department. Although as the claimant did not get the position Mr. D believes he must have been incorrect to think this.

Mr. D was stunned when the claimant was not successful, as he believed the claimant had been groomed for the position.

During cross-examination Mr. D accepted that it was not until 2005 that he gave formal notification to the college of his intention to resign.

Determination:

In relation to successive fixed term or specified purpose contracts Section 3 of the Unfair Dismissals Act 1993 allows for such contracts to be treated as establishing continuity of service and grounds the Tribunal's jurisdiction to entertain claims under the Principal Act (as amended) arising on the non renewal of such contracts in the following manner

“Provided that where, following dismissal consisting only of the expiry of the term of a contract of employment such as aforesaid ('the prior contract') without the term being renewed under the contract or the cesser of the purpose of the contract—

- (i) the employee concerned is re-employed by the employer concerned within 3 months of the dismissal under a contract of employment such as aforesaid made between the employer and the employee ('the subsequent contract') and the nature of the employment is the same as or similar to that of the employment under the prior contract,

- (ii) the employee is dismissed from the employment,
- (iii) the dismissal consisted only of the expiry of the term of the subsequent contract without the term being renewed under the contract or the cesser of the purpose of the contract, and
- (iv) in the opinion of the rights commissioner, the Tribunal or the Circuit Court, as the case may be, the entry by the employer into the subsequent contract was wholly or partly for or was connected with the purpose of the avoidance of liability under this Act—

then—

(I) this Act shall, subject to the other provisions thereof, apply to the dismissal, and

(II) the term of the prior contract and of any antecedent contracts shall be added to that of the subsequent contract for the purpose of the ascertainment under this Act of the period of service of the employee with the employer and the period so ascertained shall be deemed for those purposes to be one of continuous service.”

The Respondent’s case may be summarised as follows:

The jobs or positions undertaken by the claimant were different in character. The claimant’s service was broken. The claimant had signed a waiver of his statutory rights on entering into Contracts

The claimant’s case may be summarised as follows:

The claimant had given up a permanent job in Scotland to take up contract positions with the respondent. He did so on the basis of representations made. The claimant has established continuity in his employment. The positions held by the claimant were similar in nature throughout his service with the respondent

In considering the claimant’s position the Tribunal would refer to the claimant’s involvement, in academic work relevant to and flowing from the requirements of the contract positions, subsequent to the formal termination of such contracts.

The claimant has submitted emails and internal memos correspondence covering the period June to August 2004, which attest to the claimant’s active participation in academic work beyond the formal obligations of his contract.

The Tribunal would refer to an email sent by the claimant dated 19th July 2004, when his contract had formally expired, to the Head of the Department where the claimant had outlined his plans for continuing teaching involvement in the college for the coming academic year to commence in September. The claimant received no refutation from the college authorities in relation to this communication and the Tribunal finds that in such circumstances the claimant’s assertion is therefore in this respect unchallenged.

The Tribunal is satisfied on the evidence heard, that the claimant has established continuity of service from the time of his engagement on foot of a ten-month contract on 1st September 2003 to the date of the termination of his employment with the respondent on foot of a third contract on 18th

July 2006.

Further the Tribunal finds that certain representations were made to the claimant, which had the effect of establishing in the claimant an expectation that the fixed-term contracts were a preliminary to a permanent position which would be offered to him on their expiration. In this respect the Tribunal refers to evidence heard that the claimant was prepared by a member of staff for the interview for the first contract to run from 3rd September 2003 to 30th June 2004. The claimant did not have the benefit of such preparation in relation to the final interview with the respondent in 2006.

The Tribunal refers to evidence from Dr. M that the Head of the Department had telephoned him (Dr. M) and told him that in relation to the renewal of the claimant's contract that "it was in the bag" for the claimant. The Tribunal finds that in such circumstances the claimant was led to believe that his employment with the respondent would continue.

The Tribunal would also advert to the evidence from Mr. D to the effect that he thought that the Head of the Department would have some influence concerning the filling of posts in the Department.

In the view of the Tribunal the evidence establishes that the claimant was led to believe both expressly and inferentially that he would be offered a permanent position. In this respect the Tribunal would advert to the contents of an email dated July 25th 2006 from the claimant to the Head of the Department to the effect that the claimant gave up a permanent position in Scotland to take up a ten month contract on foot of a promise *widely witnessed and verifiable* (Tribunal's italics) that he would secure a permanent position on the retirement of Mr D. The Tribunal notes that there was no refutation of this claim.

The Tribunal finds that the condition of Section 3 (B) (iv) of the 1993 Act applies and that contracts subsequent to the claimant's first contract with the respondent were entered into for the purposes of avoiding liability under the Act.

The Tribunal is unanimously of the view that the provisions of Section 3 (a) (iv) of the Unfair Dismissals Act 1993 are applicable and that the contracts were formulated and effected for the purposes of avoidance of liability under the Act.

The Tribunal finds that following on the non-renewal of his contract the claimant's academic seniority has been irretrievably damaged. It is noted that the claimant had given evidence that he had had research plans was unable to pursue them following the refusal of the respondent to reengage him in 2006. After several unsuccessful applications to academic institutions the claimant obtained a position in October 2007 at a rate of remuneration, which was significantly lower than that he had enjoyed with the respondent. The claimant was not informed that the respondent was not in a position to offer him renewed employment until the commencement of the academic year in September 2006.

In all the circumstances the Tribunal finds that the claimant was unfairly dismissed and awards him the maximum compensation under the Unfair Dismissals Acts, 1977 to 2001, awarding the claimant the sum of €123,938.00.

The Tribunal finds that because the claimant's case is posited on his three successive fixed-term contracts and the statutory interpretation of them the claim under the Minimum Notice and Terms

of Employments Acts, 1973 to 2001, must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)