

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

RP350/2008

UD424/2008

MN384/2008

WT179/2008

against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. C. Ormond
Ms M. Finnerty

heard this claim at Dublin on 18th July 2008

Representation:

Claimant(s) : Mr. Gabrielle Haughton BL instructed by:

Colm O'Coirlain & Co, Solicitors, First Active House, Blessington Road,
Tallaght Village, Dublin 24

Respondent(s) : Ms. Deirdre Gavin, IBEC, Confederation House, 84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. He stated that he had commenced employment with the respondent in 1974, driving for the company, covering the sales office and store management. From 2007 he was principally driving.

On September 6th 2007 he incurred an accident while delivering to a client of the respondent. He was unfit for work until November. On November 8th 2007 he received a letter from the respondent stating the established retirement age was 65 and that after his termination the position

would not be filled. The letter went on to mention medical problems he had experienced during 2007 and that there was a general question mark over his general fitness that could make it dangerous for him to continue driving. The respondent also requested a confirmation of the situation as they wished to “formalize and conclude” their employment arrangement with him.

The claimant told the Tribunal he did have a slight problem with his right knee but had no other medical injuries and had never told the respondent that he had. When asked if he had ever been informed that there was a precedent in place that staff retired at 65 years of age, he replied no.

The claimant’s union representative wrote to the respondent on November 18th 2007 requesting a copy of the claimant’s contract and asked if the respondent had a medical report on the claimant to state that he could not continue to provide his services. An offer to meet was also made. There was no reply so the union again wrote on November 21st 2007. On December 21st 2007 the claimant received a letter from the respondent stating that they would meet with the claimant but that the company did not recognise his union. However, if he did wish to meet the company, with a representative, they would meet him. The claimant told the Tribunal that he then consulted his solicitor.

The solicitor wrote to the respondent on March 4th 2008 and suggested a meeting on Wednesday March 19th 2008. This date had to be rescheduled to March 21st 2008 but the claimant’s solicitor was unable to attend.

The claimant gave evidence of loss and stated that he was, at present, unable to return to work. He told the Tribunal that he never agreed to retire at 65 years of age. When asked, the claimant said that he knew of another member of staff over the age of 65 years who was still employed with the respondent.

On cross-examination the claimant stated that he had never signed his contract. When asked, he stated that he had not asked the respondent to remain working after his 65th birthday.

The claimant’s union representative from SIPTU gave evidence. He stated that there had been problems between the respondent and the union in respect of rates of pay and the finalisation of the wording of staff contracts. He stated that he had written the two letters dated November 18th and 21st 2007 to the respondent but had not received a direct reply. When asked, he stated that he had never seen a signed contract for the claimant or any other union members employed by the respondent.

On cross-examination he said that there had been a draft document (contract) but that the respondent refused to discuss the document with the union. No contract was ever accepted by the union’s members. When asked if any issues were raised with respondent in relation to the retirement age of 65 years, he replied that they had let someone else stay on. He said he felt the reason the claimant was let go was because of his injury.

When questioned by the Tribunal in relation to the draft document, he replied that it was presented to the union for discussion but they never got an opportunity to formalise the issue of the age of retirement.

Respondent’s Case:

The Managing Director gave evidence. He agreed that the claimant commenced employment as a driver in September 1974 as a driver. The claimant was given his first contract in 2004, which stated in it *“The normal retirement age is 65 years, with the option of voluntary retirement from 60 years of age”*. He stated that all staff retired at 65, however, one member of staff had remained working on a fixed term contract.

The witness stated that it had been difficult to contact the claimant between September and December 2007 but he had submitted medical certificates while on sick leave. Calls had been made to the company phone the claimant had but there was no answer bar one time. The witness told the Tribunal that the claimant had asked to remain on after the age of 65 years. The other staff member who remained had lodged his request 6 months before his due retirement date. When asked, the witness said that the claimant was replaced and therefore was not made redundant. This had not been the original plan when the claimant retired.

When asked, he said that two meetings had been set up to meet with the claimant and his representative but the claimant had cancelled both.

On cross-examination he replied, when questioned, that he could not prove that the claimant had been given a contract before 2004. When asked he said that he had been involved in 7 amended drafts of the contract. When asked when the draft finalised, he replied that having agreed with the Labour Relations Commission the contract was updated and finalised. When asked if the other employees represented by SIPTU signed their contracts, he replied that they were advised not to.

When asked about the claimant’s accident at a client’s premises he stated that he was fully aware of it and had spoken to the claimant on that day. The claimant had told him how he had gotten pinned between a truck and a fork truck and showed the witness his injured foot. The claimant then went off to hospital. The witness said that they made several calls to him to see how he was. The claimant was paid while on certified sick leave. On one call the witness was able to speak to the claimant who asked to remain working after his 65th birthday. When asked, he told the Tribunal that the client who owned the premises where the claimant had his accident had rang him, the witness, on numerous occasions to find out how the claimant was. When asked, he said he never spoke about a personal injury claim.

When asked when the claimant was replaced, he replied December 13th 2007 and he was not involved in hiring the person in question. When asked why he had asked the claimant medical status in the letter of November 8th 2007 when weekly medical certificates were lodged, he replied that he wished to talk to the claimant. When asked why he had not given a copy of the claimant’s contract to his union, he replied that he assumed the claimant would give them a copy of it. When asked, he stated that he did meet with employees’ unions.

When put to him that he had decided to retire the claimant, he replied that it was regrettable but it was unconceivable that people did not know that the retirement age was 65 years. The witness said that he had never had a personal dispute with the claimant.

When asked by the Tribunal in relation to the claimant’s accident, the witness explained that the Manager of his clients company contacted him and told him of the claimant’s accident on his premises. When asked, he said he had not been given a copy of the accident report. When asked, he said that the issue of the age of retirement had not been raised when drafting and re-drafting the contracts.

The Company Secretary and son of the Managing Director gave evidence. He stated that he had given all the staff contracts in 2003/2004. He stated that there had been a one-page document in 1993. He stated that the retirement age of 65 years was always accepted. He was not involved in replacing the claimant nor did he receive the claimant's medical certificates.

When asked by the Tribunal if he had direct contact with the employees, he replied that he was an external employee.

An employee of the respondent gave evidence. He explained that he had been employed at the same time the claimant retired. Turnover was depleting and the company had thought about using couriers to deliver but the idea was not viable. A recruitment agency was contacted and a replacement was found by mid December 2007.

Determination:

Having heard all the evidence adduced by both parties the Tribunal finds that the claimant had reached the age of retirement as stated in the terms and conditions of his contract. It was given in evidence that during the Managing Director's involvement in drawing up several drafts and re-drafts of the contract, the issue of the retirement age was never raised as an issue. Accordingly the Tribunal finds that the claimant was not unfairly dismissed.

The claims under the Redundancy Payments Acts, 1967 to 2003, the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and the Organisation of Working Time Acts, 1997 also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)