

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD108/2008

against

2 Employers

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. B. Kealy
Mr. J. Maher

heard this claim at Dublin on 22nd October 2008

Representation:

Claimant: In Person

Respondents: Ms. Marguerite Bolger B.L. instructed by Mr. Ian O'Herlihy, Mason Hayes & Curran, Solicitors, South Bank House, Barrow Street, Dublin 4, representing the first respondent.

Ms. Cathy Smith B.L. instructed by Ms. Lorraine Williams, Chief State Solicitor's Office, Osmond House, Little Ship Street, Dublin 2, representing the second respondent.

The determination of the Tribunal was as follows:

A preliminary issue was raised regarding the time limit of the claim as the claimant's employment ended on the 31st August 2007 and his T1A form was submitted to the Tribunal on the 6th March 2008.

A second preliminary issue was also raised at the outset of the hearing. The representative for the first respondent stated it was the employer of the claimant and that the second respondent acted as "paymaster". However, the first respondent dismissed the claimant as a result of steps taken by the second respondent. The first respondent also stated that the claim was precluded under Section (2) of the Unfair Dismissals Acts, 1977 to 2001. The normal retirement age in the claimant's employment was 65. The practice is that teachers retire on the 31st August following their 65th birthday. It was submitted by the representative for the first respondent that the Tribunal did not have jurisdiction to hear the case.

At the outset of the hearing the claimant stated that he was constructively dismissed by the first respondent. However, the claimant accepted that he had not tendered his resignation and he accepted that an unfair dismissal claim was more appropriate in the circumstances. Neither of the

representatives for the respondents objected to the onus being placed upon them to establish that the termination of the claimant's employment was fair and reasonable.

The claimant stated he was aware of five teachers who had worked in the same school as him and beyond the age of 65. The claimant provided the names of the five individuals to the Tribunal. The claimant also stated that there was a practice in the 1960's and 1970's whereby; teachers who reached the age of 65 were retained when there was a shortage of teachers. The representative for the first respondent stated that the five individuals named by the claimant, taught in the school in the 1940's and 1950's.

The claimant provided the name of one other individual who, within the last ten years continued to teach beyond the age of 65. The representative for the first respondent stated that this individual was not paid for the teaching that he did beyond the age of 65. The claimant accepted this.

The representative for the second respondent stated a board of management of a school could engage in new contracts with retired teachers. The representative for the first respondent stated that schools with additional resources carried out the practice of engaging retired teachers. The school named in the proceedings does not have additional resources and therefore, there is no practice within the school of employing teachers after their retirement. Sometimes the Christian Brothers continued to teach voluntarily after retirement.

The Chairperson of the Board of Management of the first respondent gave evidence to the Tribunal. Since the claimant's retirement other teachers have retired and none past the age of 65. The teachers within the school retire at the age of 65 as set down by the rules of the second respondent. The school in question does not have resources to employ teachers after their retirement. The individual named by the claimant who continued within the last ten years to teach after his retirement, did so voluntarily.

A pension official of the second respondent gave evidence to the Tribunal. He confirmed that the claimant was a member of a private teachers' pension scheme, whose members retire at the age of 65 but on the 31st August following this birthday.

The claimant reached the age of 65 in January 2007. The second respondent wrote to the claimant in March 2007 asking him to retire on the 31st August 2007. The claimant submitted the relevant application form by the end of March 2007 and his retirement was processed at the end of August 2007. The claimant had maximum pension entitlements.

Determination:

The Tribunal has carefully considered the oral evidence adduced together with the submissions made by each of the respondents and the claimant.

It was accepted by the respondents that the onus fell on the employer to establish that the termination of employment was fair and reasonable. At no time did the claimant hand in his resignation so this was never a constructive dismissal case. This was more appropriately an unfair dismissal of the sort wherein the onus falls to the employer to demonstrate that the termination was fair and reasonable.

It was accepted by all parties that the employer was the Board of Management of the National School i.e. the first respondent. The second respondent's role stems from the fact that it controlled

payroll and ultimately the pension. Of real importance is the fact that the second respondent imposed its will in relation to the imposition of a strict retirement age.

The first point raised by the respondents by way of preliminary issue was the fact that the claim was statute barred. It seems that the claimant initiated this process by giving the appropriate written notice to the Rights Commissioner on the 24th of September 2007. It is understood that an objection was raised to the matter being dealt with by a Rights Commissioner. No explanation has been given for the inordinate delay in getting this matter before the Tribunal. However, the process was initiated within the appropriate six-month period. The claimant therefore succeeds on this preliminary issue and the Tribunal is not statute barred from hearing the claim and has jurisdiction.

In addition to the above the Tribunal was asked to hear evidence in relation to a second preliminary issue which was being put forward by the respondents, namely that the claimant was excluded from bringing a case under the Unfair Dismissal Acts by reason of being exempted pursuant to Section 2(1)(6) of the 1977 Act, wherein a person who brings a claim of having been unfairly dismissed and who has also reached the normal retiring age applied to other employees of that same employer in similar employment cannot bring a claim under the Act.

The onus was therefore on the employer to establish that the claimant has reached the normal retirement age for all employees in the workplace having similar employment. In this regard the Tribunal heard evidence from the Chairperson of the Board of Management of the first respondent and a pensions official of the second respondent.

It was quite clear from the evidence adduced that the second respondent has a policy of terminating employment by reason of retirement when a National School teacher reaches the age of 65 or on the next 31st August. As the first respondent takes its directions from the second respondent on all matters relating to payroll, the first respondent could not make an exception to this rule in the case of the claimant.

In addition to the foregoing, there was uncontroverted evidence to the effect that in recent years there had been five or six school teachers retired on the basis of having reached the age of 65 (or earlier by choice). There were no exceptions made and retirement was mandatory.

In the circumstances the Tribunal finds that the claimant is indeed exempted from bringing an unfair dismissals claim under the Unfair Dismissals Acts, 1977 to 2001. The claimant's case therefore fails on the second preliminary issue raised.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)