

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee -

Claimant

Case No.
UD713/2008
RP604/2008
MN649/2008

against
Employer

- Respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Ó Riordain B.L.

Members: Mr W. Power
Ms K. Garvey

heard this claim at Wexford on 13th January 2009

Representation:

Claimant: Mr. Padge Reck, Sunrise, Mulgannon, Wexford

Respondent: Ms. Tracey Wilkinson, Liam Hipwell & Co, Solicitors,
18 Monck Street, Wexford

The determination of the Tribunal was as follows:

Respondent's Case:

Mr. C, the owner of the respondent gave evidence to the Tribunal. The company has been in business for 46 years. At present the company has 11 employees. The company had not issued contracts of employment but it was understood that employees retire at 65.

Four employees, including the claimant, retired at 65. There are no employees over the age of 65 working for the respondent. The claimant was present at a meeting concerning another employee who had an issue about retiring at 65 and from this would have been aware that the retirement age was 65.

Some two months before the claimant was due to retire he approached Mr. C and enquired about the possibility of being made redundant. Mr. C told him he could not do this, as it would be illegal,

as he did not propose to replace him. In or around this time the claimant handed in his notice but later retracted it and continued in his employment.

In the approach to the claimant's 65th birthday Mr. C mentioned to the claimant that he would be retiring soon. The claimant told him that he did not intend to retire. Mr. C subsequently wrote and sent a letter dated the 14th April 2008 to the claimant. The letter stated, "*According to our records you will be sixty-five (65) years old on the 11th May 2008 and as such you will reach retirement age. You will retireon that day in line with the company's custom and practice as previously advised.*" Mr. C subsequently received a letter from a representative on behalf of the claimant in relation to the matter.

The claimant's employment ended on the 11th May 2008 on his reaching 65. Another employee carried out the claimant's role after that date. When that employee was made redundant in December 2008, Mr. C and his sons carried out the work.

During cross-examination Mr. C accepted there was some discussion about consultancy work with the employee who had an issue about retiring at 65.

An Assistant Branch Organiser from SIPTU gave evidence to the Tribunal. He confirmed he was present at the same meeting as the claimant about another employee who did not wish to retire at 65. There was some discussion at this meeting where Mr. C made it clear to the other employee that the retirement age of 65 was company policy. The employee in question initially considered seeking an extension of service. After further consideration the employee decided to retire at 65.

During cross-examination the witness stated that there were long discussions about the retirement age prior to the employee accepting 65 as his retirement age. The witness had considered how to respond to the company if the employee did not accept the retirement age, but this did not arise. The respondent, at the instigation of the witness, had presented a holiday voucher to this employee on his retirement.

Claimant's Case:

The claimant commenced employment with the respondent in 1979. Mr. C was the founding director. The claimant had over 20 years experience in the design and weaving of all woven products. The claimant's position was that of production manager and he supervised weaving, warping, mending and winding and had worked very closely with Mr C. He was also responsible for ensuring that all orders were shipped out on time.

The company at one time had 45-50 employees. However, over the last few years the company's work was winding down.

Mr. C told the claimant on several occasions that he would look after him and that when he (Mr C) retired the claimant would retire.

The claimant stated that two of the other three people who had retired had requested it. In the case of one of these employees who was approaching 65, Mr. C had asked the claimant to enquire what the employee wanted to do as he had held a key post within the company. The employee stated that he intended to retire at 65. It was the claimant's understanding that had this employee been willing to work past 65, Mr. C would have welcomed it.

The third employee was the head supervisor who had been given notice of retirement but who initially did not wish to retire at 65. When this employee decided to retire, it was the claimant's belief that he was offered consultancy work in the context of his retiring at 65.

The claimant gave evidence concerning an issue he had in March 2008 with Mr. C's son and a remark that was made to the claimant. It was because of this event and the hurt he felt that the claimant submitted his notice to Mr. C. The claimant later retracted his notice after receiving an written apology.

On the 14th April 2008, Mr. C said to the claimant that things were bad. The claimant agreed. Mr. C informed the claimant that he would be due to retire soon and that Mr. C would carry out the claimant's work when he had retired. The claimant at this time asked Mr. C if in those circumstances might he be entitled to a redundancy payment. Afterwards the claimant received the letter dated the 14th April 2008 from Mr. C. Ensuing from this, the claimant's representative wrote a letter on his behalf detailing, among other matters, the claimant's minimum notice entitlement. The claimant received a week's wages in hand and one week's notice.

In or around the time the claimant's employment ended all of the staff were informed that they were being placed on the reduced working hours of a three-day week. On the 5th December 2008 a number of staff were made redundant.

The claimant gave evidence of his loss.

During cross-examination the claimant stated that as he did not have a contract he believed that he did not have to retire at 65. If he had believed that he would be retiring at 65, he would have signed up for a PRSA pension entitlement, as he would not receive the old age pension until 66.

The claimant stated that he had approached Mr. C twice to talk about the situation but he did not receive a response.

Determination

A key issue in this case is the determination of the normal retirement age within the company.

The respondent has argued that the normal retirement age is 65; that this was known to and accepted by the claimant and that the claimant, having retired at normal retirement age of 65, was not entitled to any redundancy (which situation did not arise) and was, by virtue of section 2(1)(b) of the Unfair Dismissals Act, 1977 as amended by the Unfair Dismissals (Amendment) Act, 1993, legally excluded from any claim of unfair dismissal under the Unfair Dismissal Acts, 1977 to 2001.

The claimant does not accept that there was a normal retirement age of 65 in the company or that it was in any way implied or incorporated into his unwritten conditions of employment.

The date of retirement is a substantial element in employment and there was no evidence of any agreement between the parties as to retirement at age 65. It is clear on the evidence that the claimant had no written contract of employment and it is also clear on evidence that the first time he was told by the respondent that he had to retire at 65 was in April 2008. Prior to that, the

evidence by the claimant (who was a credible witness) was that the only reference by Mr C to his retirement was that he would look after him and that he would retire when the manager (Mr. C) retired.

Three employees had retired at age 65. While this might lead to a presumption that the normal retirement age was 65, it is rebutted by the evidence. Two of those who retired at 65 did so at their own request and, in one of these cases, there was concern at the effect of the retirement on the respondent's business and enquiries were made by the claimant on behalf of the respondent to see what the employee proposed to do at 65 and whether he would agree (which he would not) to continue working beyond 65. In these two cases the evidence is of voluntary rather than compulsory retirement at age 65.

In the case of the third employee, it is clear that his retirement at the age of 65 was only after some exchange of views and the evidence was to the effect that the employee who retired finally agreed to do so and it is by no means clear that he retired under duress. Even if he was forced to retire at 65 it would mean that only one of the three previous retirements at 65 was compulsory – a necessary requirement to establish a normal retirement age for the purposes of the exclusion under the Unfair Dismissals legislation.

The Tribunal is satisfied on the basis of the evidence that no normal retirement age, for the purposes of the Unfair Dismissals legislation existed in the company and that a requirement to retire at 65 was not agreed between the parties or in any way incorporated into the claimant's conditions of employment. In the circumstances, the forced retirement of the claimant at age 65 constitutes unilateral termination of employment by the respondent.

It is also clear that the termination of the claimant's employment arose in an environment of economic pressure with the company placing the workforce on a three-day week. The work the claimant did was done by Mr. C and by another employee. Subsequently, other employees were made redundant in December 2008 and Mr. C's sons did the claimant's work.

The Tribunal is satisfied on the evidence that a de facto situation of redundancy existed in the company and it determines that the claimant was made redundant and is entitled to redundancy payments based on the following criteria:

Date of Birth:	11 th May 1943
Date of Commencement:	1 st September 1979
Date of Termination:	11 th May 2008
Gross weekly pay:	€749.19

It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Accordingly, the Tribunal having found that a redundancy situation existed in relation to the

termination of the claimant's employment determines that the claim under the Unfair Dismissals Acts, 1977 to 2001, must fail, the two being mutually exclusive.

The Tribunal awards the claimant €2,996.76 (being the equivalent of four weeks' gross pay) as his remaining notice entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)