

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employer

CASE NO.

UD1063/2007

against the recommendation of the Rights Commissioner in the case of:

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. B. O'Carroll
Dr. A. Clune

heard this appeal at Galway on 9th December 2008
and Loughrea on 3rd March 2009.

Representation:

Appellant(s): Mr. Don Culleton, Local Government Management Services Board, Olaf House, 35-37 Ushers Quay, Dublin 8

Respondent(s): Ms. Diane Jackson, Branch Organiser, SIPTU, No. 3 Branch, Forster Court, Galway

(This case came before the Employment Appeals Tribunal by way of an appeal by the employer [hereinafter referred to as the appellant] against the rights commissioners recommendation r-050238-ud-07 dated 7 November 2007)

The determination of the Tribunal was as follows:-

Opening statement:

Outlining the case, the representative for the appellant/employer said that the respondent was employed as a part time retained fireman. He was paid when on-call, on duty and when doing exercises.

The respondent/employee had an expectation that he would be able to remain in the fire service until the age of 65 years. A written agreement was entered into between the appellant and SIPTU in 2001 and same was implemented. This agreement was suspended in 2003 because of a national agreement, which was implemented by the appellant.

The appellant's representative indicated that a number of cases would be cited during the course of this hearing, including ...

- County Council of the County of Donegal and Neil Porter & Others [2008 No. 1906P]
- McIntyre –v– Leitrim County Council (UD926/2004)
- Gouldings Chemicals Limited –v– Bolger [1977] IR 211
- Patrick Reilly and Drogheda Borough Council [2008 No. 1906P]

Appellant's case:

In sworn evidence, J described his area of responsibility in 2001 as Director of Services for the appellant and the H.R. manager for all grades within the organisation, including that of retained firefighters. He reported to the County Manager.

In 2001, queries were received from SIPTU in relation to enhanced gratuities for retained firefighters and how same were to be calculated. J explained that a gratuity was paid when a retained firefighter retired on reaching retirement age or retired on grounds of ill health. Nationally, the level of gratuity was adjusted over the years. However, this did not happen in Galway because of the failure to get agreement on the issue of the retirement age. Up to April 2001, the appellant relied on an earlier agreement in relation to the payment of the retirement gratuity.

Following a representation from SIPTU on behalf of one of its members by letter dated 23 April 2001, meetings were held on 25 July 2001 and 30 July 2001. J had attended those meetings and the outcome of same was outlined to SIPTU by way of letter dated 31 July 2001. The issues discussed at those meetings included...

- enhanced retirement gratuity
- compulsory retirement age of 55 years

SIPTU had wanted an accommodation for certain categories of firefighters, these accommodations being ...

- firefighters would not have to retire until two years after becoming 55 years old
- firefighters who retired at 55 years would receive the maximum gratuity

J confirmed that the letter of 23 April 2001 to SIPTU set out the absolute final position of the appellant to the issues of concern, which had been raised at local discussion. The letter stated in part...

“(i) Firefighters aged over 55 at date of implementation

For firefighters aged above 55 at the date of implementation of the gratuity scheme a transitional period of two years will apply. In effect firefighters over 55 will not have to retire until two years from the date of implementation.

(ii) Firefighters under age 55 at date of implementation and who joined the service prior to Jan/Feb1985 (individual's cases to be identified and agreed)

Where Firefighters in this category at age 55 qualify for the maximum gratuity, they may be required by the council to retire.

Where Firefighters in this category at age 55 do not qualify for the maximum gratuity, they will be permitted to continue for a period of 2 years, after

reaching 55 and then they may be required by the council to retire.” (*sic*)

In light of the above, J said that if the respondent had been under the age of 52 years at the time of this agreement, he would have had to retire at 55 years with an option of continuing for a further two years. J explained that the term “may be required,” allowed the Council to require people to retire and that the Council was free to require a person to retire at 55 years. J recounted only one situation where this age limit had been extended, when a driver had been given an extended short-term new contract because a colleague/driver was retiring due to ill health and could not be replaced and the short-term contract allowed a period for the training of a replacement driver.

By letter dated 1 October 2001, SIPTU had replied to the appellant confirming that the enhanced gratuity had been accepted in a ballot of firefighters. J took it from this letter that all employees had accepted the agreement that had been negotiated and which had been set out in the appellant’s letter of 31 July 2001. The agreement was implemented by the giving of an enhanced gratuity to a small group of employees who had retired. The effective date of the agreement was 1 October 2001. No retirements were due to occur at that time and would not until two years after the effective date of the agreement.

The names of the firefighters who were covered by the agreement were named in a letter dated 15 October 2001 from SIPTU to the appellant. The respondent was one of the people named in this letter. The receipt of that letter from SIPTU ended the matter as far as J was concerned and he was satisfied that the matter had been settled for the appellant. The appellant set about paying the enhanced gratuity and this would not have happened until a firefighters retirement date approached.

In cross-examination, J confirmed that the respondent did not have a contract of employment but had an expectation that that he would retire at 65 years. He contended that the position of the Council from the negotiated local agreement of July 2001 entailed two elements, the first an enhanced gratuity and the second, a gratuity on retirement. The Council had implemented this local agreement by the payment of the gratuity. The local agreement had centred on enhanced gratuity and retirement age. Retirement age was to be at 55 years with an allowance to work until 57 years. The Council acknowledged this part of the agreement by the payment of the enhanced gratuity to two firefighters who had already retired by that stage. However, those two firefighters had retired on grounds of ill health. No one else had been forced to retire at that stage because no one else had reached retirement age. The earliest date for enforced retirement would have been October 2003 but the national agreement had superseded the local agreement by then.

J explained that the Council had not been willing to introduce enhanced gratuity without it being linked to retirement at 55 years, with a two-year transition period. The making of the local agreement would have been meaningless unless the Council actually intended for it to be implemented. J rejected the suggestion that the local agreement had only been put in place to ensure the enhanced gratuity and not to deal with the element of retirement. Subsequent to the agreement, the retirement issue simply had not arisen because of the two year transition period, and this had been superseded by the national agreement.

Replying to the Tribunal, J confirmed that some firefighters had written contracts stating that they could work beyond 55 years. The claimant had no written contract of employment but possibly had the expectation that his retirement would be at 65 years. J also confirmed that the respondent had been part of the local agreement.

In re-examination, J explained that the local agreement had been negotiated with the local union. The union members had been balloted and the Council informed of the outcome of same. The

Council had only implemented the agreement after they had been informed by the union of the outcome of the ballot.

In sworn evidence, EO explained that he had been a member of the management team dealing with the terms and conditions of pay for the retained firefighters since 1980. No gratuity had been paid to retained firefighters prior to 1973. When same was introduced, a retirement age was not identified. In the early 1980s, a claim was made for a three-fold increase in the gratuity. The issue was referred to the Labour Court. The Council were in agreement to a gratuity increase provided a retirement age of 55 years was established and this was linked to a medical. This proposal was acceptable to the Labour Court but was rejected by the union on the grounds that the proposed gratuity increase was not enough. The proposed agreement was not rejected by the union on grounds of age. The issue was re-visited in 1989 and 1991.

Council management wanted finality and so the matter was referred to the Labour Court again. The Labour Court recommended the formation of an Expert Group to deal with the issue. This proposal was accepted by Council management but rejected by the union. Strike notice was served and following a meeting in November 2002, both the management and union agreed that a collective binding agreement would be accepted.

The Expert Group was formed, comprising of a management representative, a union representative, a senior fire officer from the UK – this position was not filled – an occupational health officer and an independent chairman from the Labour Relations Commission. The findings of the Expert Group were unanimous except on the element of age. The union representative had wanted the retirement age at 60 years while the management representative had wanted the retirement age at 55 years with the option to extend same to 58 years. The independent chairman had made the final decision that the retirement age for retained firefighters would be 55 years, which could be extended to 58 years, provided that applications for annual extensions were made six months in advance and the applicant had a successful medical examination. The findings of the Expert Group applied to everyone except those who had a written contract.

By way of circular of 24 November 2003 from Local Government Personnel Section at the direction of the Minister for the Environment, Heritage and Local Government, the retirement age was set and gratuity implemented. However, the age element was challenged in a number of local authorities. The expert group had hoped that a resolution would be found and that a definite retirement age would be defined.

In cross-examination, EO confirmed that the union claim in 2002 and the subsequent Labour Court recommendation related to an increase in the gratuity and an increase in the retirement age from 55 years to 60 years. Under the 1989 Labour Court recommendation, the accepted retirement age had been 55 years though all local authorities had not enforced this age limit. EO maintained that in 1989, the union only objected to the early retirement of its members who had a written contract allowing them to work until 65 years. EO was not aware of local authorities that allowed retained firefighters work until 60 years, even in cases where such firefighters did not have a written contract.

EO accepted that the report of the Expert Group applied to all grades of firefighters. While accepting the report did not apply to those firefighters who had a written contract of employment, he rejected the suggestion that it also did not apply to those who had an expectation to work until 65 years. He denied that the Expert Group only confined itself to the increase in gratuity element but had also gone into the retirement age element in great detail.

Replying to the Tribunal, EO confirmed the report of the Expert Group did not apply to firefighters who had written contracts of employment, which stated that their retirement age was 65 years. However, only a small number of such people had written contracts.

In relation to an expectation of retirement age, EO explained that peoples understanding of “expectation” differed. Some understood it to be 55 years or 60 years or 65 years. The reasons for the different understandings of expectation were subjective and objective and in some cases, there was no basis for the expectation. In the respondent’s case, it appeared that when he joined the retained fire service, the retirement age was 65 years, thus his expectation of same for himself.

B was H.R. officer in 2003 and was aware of the national discussions in relation to firefighters at that time. She confirmed that she received the circular of 24 November 2003 from Local Government Personnel Section and that same affected a number of the firefighters in Galway. Council management were advised that the findings of the report had to be implemented and the firefighters were informed in August 2003 that the report was binding. Eleven firefighters were retired at that time.

On 22 August 2003, the H.R. department of the Council received a written application from the respondent requesting that he remain in his employment after his fifty-fifth birthday. The H.R. department replied by way of letter of 2 September 2003 and in same was stated the position of the expert report and enclosing an application form in relation to the extension of retirement.

This application form titled “Retained Fire Service Application for Extension of Employment” was completed by the respondent and returned to the Council on 15 September 2003. Within this application form is stated “I have read the 2003 report of the Expert Group on Retirement Age and I wish to apply for an extension of my employment as retained firefighter subject to the provisions contained in the report. I accept that this extension will be for a maximum of 12 months and is subject to occupational health test. No extension will be provided beyond the date of my 58th birthday”.

The Council received further applications for an extension of retirement from the respondent in June 2004 and in July 2005. However, the respondent had no direct contact with the Council in relation to this issue nor had he raised any concerns when completing the application forms. He completed medical examinations in relation to the extension of retirement age.

By way of letter dated 19 December 2006, the Council were notified by the respondent that as his services as a part-time firefighter were no longer required from 21 December 2006 by the Council, he was leaving “after that date under protest”. B could not recall if she had received a protest directly from the respondent.

B confirmed that she received a letter dated 21 December 2006 from SIPTU Galway on behalf of the respondent. A number of retained firefighters had retired on foot of the 2003 report from the Expert Group, both at that time and subsequently. B therefore assumed, based on these retirements that the respondent would have been aware that the Council were implementing the report of the Expert Group. B had been part of the negotiating team of the Expert Group. She had understood that the union members, by way of ballot, had accepted the national agreement that all retained firefighters, with the exception of those who had a written contract of employment specifying a retirement age of beyond 55 years, retired on reaching 58 years. This was reflected in B’s letter of acknowledgement of 4 January 2007 to SIPTU Galway.

In cross-examination, B confirmed that she understood from the respondent's letter of 22 August 2003 that he wanted to continue in employment beyond the age of 55 years. He had made no mention of the report of the Expert Group in his letter. B acknowledged that two subsequent letters had been received by the Council from the respondent. In same, he had insisted that he did not want to retire at 58 years. However, B contended that she had not been aware that the respondent was not accepting retirement at 58 years and he had made no approach to her about this.

The respondent was retired solely on his age and no issue arose in relation to his performance as a firefighter or his medical condition to do the job.

B confirmed that she had not sent a copy of the report of the Expert Group to the respondent, nor did she know if anyone within the Council had sent a copy of it to him. She explained that it had been her understanding that SIPTU, as his union representative, had discussed the contents of the report with him. She had not discussed the contents of the report with the respondent, or the alterations it would have on his conditions of employment.

If the respondent had not applied for and signed that forms seeking an extension of the retirement age to 58 years, B confirmed that his retirement would have been initiated and he would had been retired.

In evidence, the Senior Assistant Chief Fire Officer (*hereinafter referred to as SACFO*) stated that he made monthly visits to the fire station and to drills, and that the respondent had never raised the issue of retirement age with him directly or through his station officer.

Respondent's case:

The respondent's representative contended that the national agreement did not apply as SIPTU had lodged a claim to increase retirement age. She contended that the respondent had not agreed to change his retirement age, and had expected to retire at 65 years old.

The local Shop Steward (*hereinafter referred to as SS*) gave evidence that when he commenced his employment with the fire service, the station officer had told him that he hoped he would last until 65 years, and that was his expectation.

SS was involved in reaching the local agreement in 2001 to secure an enhanced gratuity. The County Council wanted to have a document before they would give the enhanced gratuity, but SS believed it was clear that the Council would never use the document to dismiss a retained firefighter. SS pointed to the phrase in the agreement, outlined in a letter dated 31 July 2001 stating that, 'Where fire fighters in this category at age 55 qualify for the maximum gratuity, they may be required to retire'. SS had sought for the document to have the word changed from 'will' to 'may' in that phrase.

SS accepted that if the gratuity were to be paid, the retirement age would be 55 years. There was a two-year transitional period before anyone would be retired as the result of the agreement. SS retired on foot of that agreement in 2003, though after further proceedings, he later made a settlement with the County Council. After his retirement, SS returned for a year on contract as a driver, as there was no driver at that fire station. SS agreed that this was for exceptional circumstances.

SS did not accept that the national negotiations in 2002 applied to them. He believed it related to

contracts for those over 65 years. There were staff over age 60 years at that time.

A second witness for the respondent gave evidence that he had been involved with the Expert Group on retirement age, as the result of a Labour Court recommendation. One of the findings of the Group's report, *Retained Fire Fighters, Review of Retirement Age, 2003*, was that retained firefighters, without written contracts, had the option of retiring at 58 years on the condition that annual medicals were passed. The witness was unhappy that retained firefighters without a written contract were being forced to retire at 58 years. The county where he worked had the policy of retiring retained firefighters without written contracts at 60 years and he considered this to be the correct interpretation.

The respondent gave evidence that he commenced his employment as a retained firefighter in 1979 and was told by the station officer that the retirement age was 65 years. He was aware that newer recruits were given a retirement age of 55 years, but he did not believe that this applied to him.

The respondent did not believe that the 2001 local agreement would affect his expected retirement age. He did not know a lot about the national discussions on retirement age and had never been told about it, but had just heard about it in the station. The respondent wrote to the County Council on 22 August 2003 stating that he wished to continue his employment after his 55 birthday on 22 December 2003. He was taken aback by the response that he had to apply if he wished to remain for a further year. He showed it to his station officer who told him if he did not sign the form, he could be dismissed and so he signed it. The respondent never saw a copy of the Expert Group referenced on the form. No one had discussed the report with him, or how it affected him.

The respondent received a letter on 25 August 2005 from the County Council stating that his extension had been granted until his 58 birthday, and if he wished to continue beyond age 58 years, he would have to make a formal application six months prior to his 58 birthday. The respondent replied on 17 May 2006 stating that he wished to remain on after his 58 birthday. When he did not receive a reply the respondent wrote again on 6 June 2006 stating his 'determination to stay on as a retained fire-fighter'. The respondent received a reply, which informed him that there was no option to remain as a retained fire fighter after his 58 birthday and that his retirement date would be the 21 December 2006.

The respondent received a letter dated 14 December 2006 informing him of his retirement on 21 December 2006. The respondent wrote to the County Council on 19 December 2006 to state that he was leaving his employment under protest. The respondent received a reply, dated 4 January 2007 from the County Council stating that the report of the Expert Group applied to all retained firefighters with the exception of those with a written contract specifying otherwise.

In cross-examination the respondent agreed that he was a member of SIPTU and accepted that they had negotiated on his behalf. He did not recall any specific ballot. The respondent disputed that his signing of the annual forms after age 55 years meant that he accepted the retirement age of 58 years. He did not raise the issue separately with the Council, as he did not think there was any point. He did not agree that signing the forms changed his terms of employment and he had felt under pressure to sign the forms.

Determination:

Having heard and carefully considered all of the evidence adduced, the Tribunal finds that the appellant's case succeeds. In reviewing the material submitted by the representatives, the Tribunal

finds that the rationale in the High Court decision in the case of County Council of the County of Donegal and Neil Porter & Others delivered on 23 March 1993 stands. In same, Mr. Justice Fergus Flood stated...

“1. That the respondents and each of them are employed on the basis of an expectation-, all things being equal, they would continue in the fire brigade service up to age 60.

2. That nothing had occurred in the intervening years which could be said to alter that state of affairs by consent.

3. In principle, in my view the attempt to force them into retirement by dismissal at age 55 is an attempt to unilaterally alter that contractual situation and would be in breach of contract unless it can be justified in some other lawful way.”

Applying the reasoning of this case, the Tribunal finds that the signing by the respondent of the forms for the “Applications for Extension of Employment” may be said to have fundamentally altered the expectation of the respondent in relation to his retirement age. In making this finding, the Tribunal is influenced by the evidence adduced that the respondent, on three separate occasions over a period of three years, signed the application forms for the extension of employment which, on each occasion, stated thereon “No extension will be provided beyond the date of my 58th birthday”. Further, the Tribunal is influenced by the fact that the respondent did not, over the period of these three years, seek to question or challenge this central provision set out on the application forms for the extension of employment.

The Tribunal believes that the circumstances of this case are distinct from the circumstances highlighted in the judgement of Miss Justice Laffoy in the High Court decision in the case of Patrick Reilly and Drogheda Borough Council delivered on 19 November 2008, which was submitted to the Tribunal. In that case, the plaintiff clearly stated that he had never been informed of the alteration in the retirement age for a retained firefighter. In relation to the present case, nothing in the respondent’s conduct could support the belief on the respondent’s part that the expectation he had held in relation to his retirement age prevailed over the stipulations of the documents signed by him, as cited above.

Accordingly, the Tribunal upsets the recommendation of the rights commissioners under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)