

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE - *claimant*

against

EMPLOYER - *respondent*

under

CASE NO.

UD619/2009

MN1398/2008

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. McAveety

Members: Mr. D. Morrison
Mr. G. Hunter

heard this claim at Letterkenny on 21st May 2009
and 14th October 2009

Representation:

Claimant(s): Mr. Bernard Moynihan, ASTI, Thomas MacDonagh House, Winetavern
Street, Dublin 8

Respondent(s): Mr. Ian O’Herlihy, Mason Hayes & Curran, Solicitors, South Bank House,
Barrow Street, Dublin 4

The determination of the Tribunal was as follows: -

Claimant’s Case:

The claimant worked as a substitute teacher for the respondent from September 2002 to 2003. The claimant went to Manchester in order to qualify as a teacher in 2004 until 2005. The claimant qualified and returned to work for the respondent from 2005 to 2007 as a substitute teacher. In February 2006, a permanent job became available and was advertised. The claimant applied but was unsuccessful. The claimant and the business teacher at the respondent school applied for a position in Longford. The claimant was unsuccessful, but the business teacher was successful in her application and left the school. As a result, the claimant was given the business teacher’s hours on a regular basis. The claimant had been teaching four subjects – Business, CSVP, LCVP and Mini Company. Along with these subjects, she also continued with substitute hours into the academic year 2007 to 2008. The claimant requested a contract of employment to which the deputy principal replied he would get back to her but never did. The claimant was paid on an hourly basis;

she never received any holiday pay.

On 13 June 2008, the school chaplain approached the claimant and told her he had heard she was not going to be around the following year. The claimant had no reason to believe she would not be returning to work the following year. The claimant then requested a meeting with the principal. At that meeting, the principal congratulated the claimant on a successful year but informed her he had no further hours to offer her for the following year. The principal advised the claimant to move away and gain some experience. The claimant told the principal that she was disappointed and would be checking her rights in relation to her employment, to which he replied that she had no rights. The claimant wrote to the Board of Management the following day and asked them to look into her case. They responded by letter informing her that they would discuss the situation at the next board meeting. After the meeting, the Board of Management informed her that she had no employment rights. The final school year the claimant worked was from the 27th of August 2007 until the 2nd of June 2008.

It is common for a substitute teacher to substitute in a few schools at the same time depending where they are needed. The permanent teachers get the hours available first then a substitute teacher would cover the remaining hours. The claimant was offered further substitute hours but declined as she felt the offer was insincere. A business teacher and an English teacher covered the claimant's hours.

Claimant Cross Examination

All schools have substitute teachers that are required depending on another teacher being sick. It is common for substitute teachers to substitute in a number of different schools simultaneously. The claimant accepted that teaching hours should be given firstly to permanent teachers before a substitute is called in.

Preliminary point:

The respondent's representative stated that as per the claimant's evidence, the claimant did not have one full years service prior to making a claim under the Unfair Dismissals Acts.

Preliminary issue:

At the commencement of the resumed hearing, the claimant's representative raised an issue in relation to the constitution of the respondent's Board of Management and the credibility of decisions made by Board, as one of the decision makers on it – a member of the VEC – acted as its secretary though he was not nominated onto the Board and therefore had no function in relation to the respondent's operation and should have no involvement in same.

In reply, the respondent's legal representative stated that this issue was a "red herring" and was not relevant to the case before the Tribunal, and that the only issue was to the fairness or otherwise of the termination of the claimant's contract of employment. In relation to the role of the member of the VEC, the respondent's legal representative stated that their position was that this person was entitled to be involved in the respondent's Board of Management and the Deeds of Trust provided for same.

Having considered the matter, the Tribunal queried if the issue in relation to the proper constitution of the respondent's Board of Management needed to be resolved in another forum before this case

the claims under the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 – could proceed, as any decision made by the Tribunal against an improperly constituted Board of Management could be worthless.

Having taken time to consider the Tribunal's query, the claimant's representative confirmed that they had no issue and that they accepted that the respondent's Board of Management was properly constituted, though the role of the member of the VEC on same needed to be clarified. They also confirmed that they wished that the hearing of this case would proceed.

Respondent's case:

In his sworn evidence, the school principal (hereinafter *referred to as TG*) confirmed that he took on the role of principal in September 2007, having worked in the school since 1995 teaching English.

The respondent is a community school with a current population of 469 students. The Board of Management are the overall managers of the school but its day-to-day operation is done by the principal and the deputy principal. The Deed of Trust provides for the running of the school between the Department of Education, the Diocese of Raphoe and the Board of Management, where the Diocese owns the school, the Board of Management employs the staff and the Department pay staff salaries. An allocation of staff numbers is provided by the Department of Education and is based on student numbers. The current allocation is 36.25 teachers.

It is the role of the principal and deputy principal to design a time-table for teachers. The construction of a time-table is governed by the demands of students in the choice of subjects which they want to pursue, and cover for core subjects, they being English, Gailge and Mathematics. The core subjects are prerequisite subjects which all students must study. Over and above these core subjects, there are twelve optional subjects for Junior Certificate and eight optional subjects for Leaving Certificate. The commitment to contracted teachers is also a factor which is considered when designing a time-table. Contracted teachers include permanent positions, pro-rata part-time positions, contracts of an indefinite duration positions and special needs allocation positions. The commitment is to fill the time-table with contracted positions first. Where it is not possible to fill all posts and gaps remain in the time-table, these gaps are filled from the subbing panel. However, there is a Department of Education and Union requirement on community schools that 95% of teaching posts have to be filled from contracted permanent positions.

The Department of Education circular 17.2008 sets down the provision that the Board of Management advertise teacher positions. A selection committee is formed to conduct interviews and they give their recommendations to the Board of Management who then make appointments from those recommendations. The selection committee is an independent body made up of five to six members who are nominees of the Trustees.

In a case where it was not possible to match permanent contracted teachers – qualified with a higher diploma – to teach subjects that are in demand, outside people are called on from the substitute panel. These substitute people would have indicated their availability to teach on days when a permanent teacher would not be available. It was through this method that the claimant came to be employed by the respondent. Prior to TG becoming principal of the school, the claimant was employed in the academic year of 2003/2004 in an unqualified capacity from the substitute panel. In the year 2004/2005, she went to Manchester to gain her qualifications and from 2005 until March 2007, she made herself available for cover in a casual capacity from the substitute

panel.

In March 2007, a permanent teacher of Business Studies resigned her position. The teaching hours of this resigned teacher had to be covered and accordingly, the hours were distributed to the claimant and another existing Business Studies teacher (*hereinafter referred to as Tara*). The claimant was paid for teaching those hours in the same way as she had been when employed as casual cover. Her teaching hours for Business Studies continued until May 2007. Payments to the claimant also ended with the end of this contract, because as she had been employed under a casual contract, there was no way to pay her beyond this date.

At the end of August 2007, the claimant was brought back to the school to cover the hours of Business Studies again in a similar capacity. She resumed her teaching in early September 2007 and continued until the end of May 2008. She was only paid for the hours of class contact. She covered between 18 to 22 hours of teaching per week depending on need, 22 hours being the maximum that a teacher can be contracted for. For the academic year 2007/2008, the claimant was contracted from 27 August 2007 to 26 June 2008 but this period was punctured by holidays and for periods when the claimant had no class contact. She was also not employed by the Department of Education during the summer months.

In October 2007, the respondent had three teachers in positions of casual cover on a substitute basis, they being the claimant, Kev an unqualified art teacher and Mielle a recently qualified chemistry teacher. In November 2007, TG contacted the payroll section of the Department of Education and was informed that if people were to be allocated teaching hours on a contract basis, a school audit of teaching needs would have to be conducted and if it was found that teachers were required, the actual existence of positions would first have to be advertised and interviews for same conducted by the selection committee. At the end of that academic year, teaching posts became available. At this time, the claimant, Kev and Mielle had been employed as substitute teachers and had not been awarded a contract by the school.

For the academic year 2007/2008, in March 2007 – five months earlier than normal – first year students were brought in so as they could make known the options of subjects which they wanted to pursue, and thus allow the school to project the teaching needs for the coming year. Fifth year students were also introduced early to the school so as to allow them time to make their subject choices for the coming Leaving Certificate cycle. Consequently, by June 2008, the school was in a position to draft a final time-table based on student demands and to tell the Department of Education what their needs were. As a matter of courtesy, TG spoke to the three substitute people on 28th April to inform them about the school audit and that where areas of need were established, these positions would be advertised. Arising from the school audit and student choices, vacancies in art and biology/chemistry were established. The Board of Management were informed about the need to advertise for additional contract teachers for these three areas, and on 17th June, TG relayed this information to the substitute people.

The claimant's qualification had been in Business Studies. When TG spoke to the claimant on 17th June, he informed her that there was a demand for 32 hours per week for business and economics. The deputy principal was contracted to provide up to 18 hours of business and 8 hours of economics, and Tara was contracted to provide up to 22 hours of business. She was informed that the contracted teachers would be covering the Business Studies hours for the academic year on 2008/2009 and she was invited to continue on the substitute panel and be engaged as a substitute teacher. The claimant declined this offer.

Mielle was successful at interview and got a teaching contract for the vacant chemistry position. Kev who was unqualified did not apply for a contract position but remained on the substitute panel and continues to get hours as a substitute teacher. Had the claimant chosen to remain on the substitute panel, she would also have been given teaching hours. A qualified substitute teacher supersedes an unqualified one, thus priority is given to a qualified teacher when teaching hours are being offered. If the claimant had remained on the substitute panel, she would have received substantial teaching hours as the school had employed two unqualified substitute teachers in 2008. In 2008, the claimant applied for the position as resource cover but this position had not been available. She also made herself available for substitute cover in September 2009 and worked for the respondent on 29 and 30 September, covering in Mathematics. It was TG's expectation that the claimant would continue to receive teaching hours as a substitute. She had not been treated differently from any other substitute teacher in the getting of available posts in the school or in the number of substitute teaching hours, which she got. She was also welcome to apply for any post that becomes available in the school.

It was TG's understanding that, with the exception of people on a substitute panel, all teachers are required to be interviewed prior to appointment per the PPT 19/03 circular of the Department of Education. It was also a requirement that a pro-rata contract be advertised and an interview conducted for the filling of same. The hours of the teacher who resigned were not advertised, nor was the claimant interviewed for same when she filled these hours from February 2007 to June 2007, and this was not in accordance with the Department of Education circular. If she had been given a pro-rata contract at that time without an advertisement and interview for same, it would have breached the Department's circular.

In cross-examination, when put to TG that the claimant had been moved from her job to provide a position for his wife, TG explained that his wife had applied for the Higher Diploma in the academic year of 2008/2009 and had been successful with same. She had done her teacher training block release at the respondent school, of which she was a past pupil. In August 2009, she submitted her curriculum vitae for the cover panel for substitute teachers and is currently on that panel.

TG accepted that the claimant commenced employment on a casual basis with the respondent in the academic year 2002/2003. She also worked on that basis in the academic year 2003/2004. She worked as a casual substitute in the academic years 2005/2006 and 2006/2007, and from February 2007 to June 2007, the claimant picked up the Business Studies hours of the retired teacher who had been permanent. TG agreed that in August 2007, the Board of Management advised the claimant that she would be continuing with the same teaching hours. However, he had not offered the claimant any advice, nor was he in a position to offer advice as he had not been school principal at that time, only taking up this post in September 2007.

The claimant returned to work in the school in August 2007, but in terms of actual teaching time, she was paid from September. Her qualification was in Business Studied but she also taught History, Geography, CSPE, LCVP and transition year Mini Company.

When put to TG as to why the claimant had not been offered a pro-rata contract in August 2007 as she had 7.8 specific hours of teaching for that school year, TG replied that on taking up the position as principal, he had checked with the Department of Education and had been advised that as no interviews had taken place for vacant positions, no contracts could be awarded for same, and accordingly, no appointments could be made until the following summer. The claimant had been brought in August 2007 as a cover position replacement for a few hours per week for the teacher

who had retired. When asked why the claimant had not received a pro-rata contract in August 2007 and accordingly, under the Protection of Employees (Part-Time Work) Act 2001, a rate of pay comparable with a permanent teacher, TG replied that he had inherited a system where substitute people were paid hourly, even those substitute teachers who had specific teaching hours. The Department of Education had informed him that a vacant teaching post had to be advertised and, interviews for same conducted by a selection committee. No one could be appointed until an interview had taken place. The respondent had been bound by the Department of Education's circular in relation to appointments to permanent posts and the needs of the school. It was not the case that the claimant had been moved aside and her specific teaching hours given to Tara despite the fact that the claimant was employed in the school prior to Tara. Both the claimant and Tara had been interviewed for a permanent teaching post. The claimant had not been successful at that interview. Tara had been successful and had been appointed. She had been given teaching hours in accordance with the circular of appointment.

The allegation that TG had met the claimant in Easter 2008 and told her to move away from home and gain further experience in teaching was not correct. He never advised the claimant what she should do. He and the deputy principal had met her on 24th April and told her about the school audit and that if it was found that teaching hours were available, such a post would have to be advertised in accordance with the Department of Education circular. On 17th June, he and the deputy principal had met the claimant again and advised her that 33 hours of Business Studies were available, that she had not been successful in getting appointed to teach these hours but that she was welcome to continue on the substitute panel. She had told him that she no longer wanted to be part of the substitute panel. He agreed that the claimant had made herself available to teach all subjects.

Replying to Tribunal questions, TG confirmed that the pro-rata position had been advertised and the claimant had applied for same. However, she had not been successful at the interview. He had contacted the Department of Education in November 2007 so as to clarify the position in relation to appointments.

TG did not give personal advice to the claimant to move out of home. He had advised her that the respondent would help her and that she would be kept on as substitute cover. When he was advised in September 2009 that the claimant was again available as a substitute, he had brought her back.

Closing statements:

The respondent's legal representative stated that it was the claimant's belief that when she got the Business Studies hours for the portion of the year of 2007, which had been the teaching hours of the teacher who retired, she was subsequently entitled to a pro-rata contract. It was the respondent's position that this was not the case as it was not in line with the provisions of circular PPT 19/03 of the Department of Education.

The claimant's representative stated that the issue of the entitlement to a pro-rata contract in September 2007 for 2007/2008 is critical to this case. The claimant had been in the school covering the teaching hours and was therefore entitled to a pro-rata contract. The provisions of circular PPT 19/03 provide that where a substitute teacher receives teaching hours as the claimant did, they are entitled to a pro-rata contract and payment of a pro-rata basis.

Determination:

The Tribunal very carefully considered the verbal evidence which was adduced during the course of

the hearings of this case, and the substantial written submissions which were received subsequent to the hearing and with the permission of the Tribunal.

To ground an application for unfair dismissal under the Unfair Dismissals Acts, 1977 to 2007, a claimant must have one years continuous service calculated pursuant to the provisions of Schedule 1 of the Minimum Notice and Terms of Employment Act, 1973. Service is deemed to be continuous unless otherwise broken.

In this particular case, the claimant gave evidence that in the academic year leading up to her dismissal, she worked from the 27th August 2007 to 2nd June 2008. In the previous academic years 2006/2007, she worked from the 4th October 2006 to the 4th June 2007 and before that from the 1st September 2005 to the 5th June 2006. Her working relationship with the respondent was punctured with school holidays and mid term breaks during which she was not paid. The claimant in her own submission claims to be employed on a Fixed Term Contract for the academic year 2007/2008 and that her periods of absence from work constituted period of lay off or period of absence by agreement and did not break service.

Reference has been made to the provisions of Section 2(5) of the Unfair Dismissals Act, 1977 as inserted by Section 3(c) of the Unfair Dismissals (Amendment) Act, 1993 with regard to break in service, but the Tribunal find that it has no application to the present case.

The Tribunal have further considered the provisions of Section 2(b) of the Unfair Dismissal Act, 1977 as inserted by Section 3 of the Unfair Dismissals (Amendment) Act, 1993, which has direct application to successive fixed term contracts. That section inter alia provides that continuity of service is confirmed for the purpose of ascertaining service of an employee where the break in service is three months or less between successive contracts, provided that, the nature of the employment, the subject of the contracts, is the same or similar and in the opinion of the rights commissioner, Tribunal or Circuit Court, the entry by the employer into the subsequent contract is wholly or partly connected with the avoidance of liability under the Act.

Section 2(1) of the Protection of Employees (Fixed-Term Work) Act, 2003 defines a "fixed-term employee" as *"a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event"*.

The Tribunal have carefully considered the application of this provision to the claimant's case. The Tribunal accept the claimant's evidence that she was employed on a series of fixed term contracts within the meaning of Section 2(1) aforesaid. However, the Tribunal are of the view that the renewal of these contracts **was not wholly or partly connected with** the avoidance of liability under the Act as provided for in Section 2(b) of the Unfair Dismissal Act, 1977 as amended.

In the circumstances therefore, the Tribunal finds that the claimant does not have one year's continuous service within the meaning of Section 2(b) of the Unfair Dismissals Act, 1973 as amended and accordingly, the Tribunal declines jurisdiction in this case. The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 is also dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)