

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE - claimant

CASE NO.

MN573/09

RP586/09

UD565/09

Against

EMPLOYER - respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. J. Goulding
Mr. S. O'Donnell

heard this claim at Naas on 4th February 2010.

Representation:

Claimant: Mr. Tiernan Lowey B.L., instructed by J J Fitzgerald & Company, Solicitors, Friar Street, Thurles, Co Tipperary

Respondent : Ms Kiwana Ennis B.L. instructed by respondent

The determination of the Tribunal was as follows:-

Respondent's Case:

The Financial Director gave evidence. The respondent is a security firm with forty-one years experience. Employees in a company S transferred to a company C and subsequently employees in company C transferred to the respondent company on 16th August 2006. The respondent secured the security tender in a company W. Newly appointed employees in the respondent company signed the respondent's contract of employment. A total of thirty employees transferred.

The security industry is a highly regulated industry and security companies must comply with the

IS999-2004 standard. Following a routine audit of the respondent's personnel files, the respondent wrote to the claimant on 16 May 2007 asking him to attend for a medical, as he was over 65 years of age. The claimant was 70 years at this time. Following the medical examination he was certified fit for work.

The claimant's union raised the issue of the claimant's retirement age clause. The union was aware that a large number of employees retired at 65 years of age. The witness contended that the documents forwarded from company C were wholly incomplete. The respondent located a contract of employment signed by the claimant on 24th February 1996 while he worked in company S. This stipulated the claimant's normal retirement age as 65 years. The witness's understanding at this time was that company C contract of employment had superseded this.

Both the witness and the Director of Personnel met with the claimant on 21st January 2009 to raise the issue of the retirement age clause. The claimant was asked whether he was aware that his contract of employment signed in February 2006 specified a retirement age of 65. The claimant said he was. The claimant said he had not received written permission from company C to remain in employment after his 65th birthday. The claimant then said he was going to seek legal advice. The meeting adjourned to allow the claimant time to seek legal advice.

A second meeting took place on 26th January 2009. The claimant said he was taking legal advice. The claimant raised the issue of redundancy but the witness said this did not arise and that in any event the company policy on all redundancies issues by agreement with the staff union is last in first out.

At the conclusion of the meeting the witness contended that as the claimant had not furnished any pleas or submissions the company was left with no alternative but to implement the retirement age clause with immediate effect. The claimant was paid all monies owed to him including his notice entitlement. He was not required to work out his notice. His P45 subsequently issued to him.

Those employees who commenced working in company C and subsequently transferred to the respondent had no retirement age clause in their contracts of employment. Two of these are now over 65 years of age. No redundancies had been made in the respondent company to date. The claimant has been replaced in his position

Under cross-examination the witness agreed that the company was responsible for all obligations and liabilities upon the transfer of undertaking from company C. The company had sought contracts of employment before the transfer. The claimant was not permitted to work out his notice. At the meeting on 21st January 2009 the claimant did not engage in meaningful dialogue. It was the respondent's sincere belief that the claimant had company C's contract of employment.

The witness said that the claimant had been an exemplary employee, had been certified fit to work, was more than capable and a valuable supervisor. He had a good working relationship with him.

Claimant's Case:

The claimant gave evidence. He worked as a static guard in company S until 1996. He signed a contract of employment. He was transferred to company C in or around 2000. He was contracted to work at company W. He worked on a day shift. Company C never raised his retirement age with him during his tenure. In 2006 he was transferred to the respondent company.

By letter dated 16th May 2007 the claimant was asked to attend for a medical examination, as he was over 65 years. He complied with this request and continued in his employment. He was 70 years of age at this time.

In 2008 he heard that company W might be cutting back on staff. It was mused that those over 65 could be made redundant.

The respondent invited him to meeting on 21st January 2009. A document had been found on his file that stipulated his retirement age as 65. He was speechless. That meeting was adjourned as the respondent needed to consult issues at hand. A second meeting was arranged for 26th January 2009. At this meeting his retirement age was again raised. He had had no support from his union. He felt the company had already made up their minds. He was taken aback. He presumed his employment was going to be terminated. He said he was taking legal advice. The company said they had no alternative but to invoke the retirement clause in the claimant's contract of employment and that he would be paid his due notice. He was not given the option to work out his notice period.

The claimant said he worked 48 hrs one week and 36 hours the second week. This averaged out at 42 hours. He has been unsuccessful in obtaining work since the termination of his employment and said it was highly unlikely he would secure work in the future. He is in receipt of the State pension.

Under cross-examination the claimant contended that he was unsure if he signed a subsequent contract of employment with company C. To the best of his knowledge he had not. At the time he signed the contract of employment for company S retirement was the last thing on his mind. At the two meetings of 21st and 26th January 2009 he remained somewhat silent, as he was totally shocked. He did not recall the Director of Personnel stating that redundancy did not arise in this instance referred to in the minutes of the meeting of 26th January 2009. His understanding at that time was that the company was trying to avoid paying him redundancy. He felt it was a done deal. Company W was trying to downsize and it just happened that the respondent located his contract of employment.

He felt the company wanted to remove him and save money. He has been replaced in his position in company W.

Determination:

The Tribunal finds after considering all of the evidence, documentation and legal submissions that the parties were mutually mistaken as to their positions under the contract of employment. The claimant was of the belief that there was no retirement age limitation in his contract or at the very least did not address his mind to the issue of the mandatory retirement age. He was justified in thinking that he was not contractually bound to retire at the age of sixty five when he was allowed continue on with company C until the age of sixty nine and then with the respondent until the age of seventy two. The respondent took active steps in relation to the claimant due to his age and stated that they were obliged to have him medically assessed annually due to his age. He passed his medical examination without issue and the respondent was more than happy to keep him on, stating that he was one of their most experienced and best security guards.

Where it is shown that owing to a mistake in ones contract, the contract does not reflect the real intention of the parties, it can, in law, be read so as to reflect the true intentions of the parties.

What was the intention of the parties? The claimant's intention was clearly to work on beyond the age of sixty five. He was sixty nine when he was transferred from company C to the respondent. After the date of transfer he continued on working as normal in accordance with his intentions. The respondent was fully aware of the claimant's age at the date of transfer. They were mistaken as to the terms of the claimant's contract in relation to his retirement age however they were happy to let him remain on so long as he attended for his medicals and was certified fit to work. It is clear from the actions of both parties that their mutual intention at the time of transfer was that the claimant would remain working until certified unfit to do so or until the claimant decided to retire himself.

The respondent stated that their main fear in keeping the claimant on once his original contract had been located was that if they allowed him to remain on in breach of the retirement clause in his contract that that would render void the retirement clause in their own PSS limited contracts. The tribunal does not accept this argument. The claimant was in a unique position in that he was sixty nine when he commenced work with the respondent and his contract was created by a different entity. No other employee of the respondent falls into that category.

The Tribunal finds that the claimant was unfairly dismissed and finds that the most appropriate remedy is to reinstate the claimant. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. As the Tribunal finds that the claimant should be re-instated the claims under the Redundancy Payments Acts, 1967 to 2007 and Minimum Notice and Terms of Employment Acts, 1973 to 2005 are therefore dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)