

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *Claimant*

CASE NO.
UD78/2009

against

EMPLOYER - *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn B.L.

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 21st July 2009

Representation:

Claimant(s): Ms. Maureen Lane, Solicitor, Lane & Company, Ducart Suite,
Castletroy Park Commercial Campus, Limerick

Respondent(s): Mr. Glenn Cooper, Solicitor, Dundon Callanan,
17 The Crescent, Limerick

The determination of the Tribunal was as follows:-

In these proceedings, the Claimant seeks redress pursuant to the Unfair Dismissals Acts, 1977 to 2007, in respect of the termination of his employment as a porter with the Respondent at its hospital premises in the City of Limerick.

The Claimant's employment commenced on the 6th June 2006 and having received a dismissal notice on the 26th May 2008, ceased his employment with the Respondent on the 26th June 2008.

It is common case that at or about the commencement of his employment, the Claimant was provided with a document by the Respondent entitled "*Statement Of Terms And Conditions Of Temporary Employment*". This provided *inter alia*

*"the purpose of this employment is to back fill a post until this post is filled on a permanent basis. This contract will cover the period from the commencement of employment i.e. Monday 6th June 2006, until the purpose of employment expires. **This is a specific purpose contract of employment and therefore the provisions of the Unfair Dismissals Acts, 1977-2001, will***

not apply to the termination of this contract where such termination is by reason only of the expiry of the specific purpose"

On the 7th June 2006, the Claimant signed the document aforesaid acknowledging that he had read the terms and conditions therein, confirmed that they had been explained to him and that he clearly understood and agreed to be bound by them. A representative of the Respondent also signed the said document.

As the fact of dismissal was not in dispute in this case, the onus lay with the Respondent to establish on the balance of probabilities, that the termination of the Claimant's contract of employment was by reason only of the expiry of the specific purpose thereof, i.e. the filling of the post on a permanent basis.

The Claimant in his Form T1-A to the Tribunal asserted in its material respects *inter alia* that two full time positions as porters were filled for over twelve months for which he remained in service and that he was astounded to receive his notice of termination without any explanation or objective ground for his sudden and unfair dismissal. Furthermore, that alternative options were provided by SIPTU to keep him in employment, of which the Respondent refused to take cognisance. In addition, by letter dated the 14th July 2009, the Plaintiff, through his Solicitor,

- (i) denied that the purpose of his contract of employment dated the 7th June 2006, had ceased on the 26th June 2008, or at all.
- (ii) denied that the "post" referred to at paragraph 1 of his contract aforesaid was one and same as the "post" filled by a subsequent competition"
- (iii) asserted that the post of temporary porter continued to subsist within the Respondent's organisation and that he was unfairly dismissed from such post.

In his opening statement to the Tribunal, Mr. Cooper outlined how the Respondent had twelve permanent positions for porters in its employment and that the Claimant was engaged as a porter on a temporary basis in mid 2006, for a specific purpose, that being until the appointment of a porter on a permanent basis. As events transpired, the appointment of a porter on a permanent basis was not fulfilled for some time, due to protracted negotiations between the Respondent and SIPTU in relation to rostering issues pertaining to porters.

Ultimately, an open competition was organised for the purpose of filling the post of porter on a permanent basis. The position was advertised publicly, the Respondent received approximately one hundred applications and the Claimant was one of seventeen applicants who were short-listed for interviews for the position.

Following the interviews of the short-listed applicants, the Claimant was placed fifth in a list of eight persons, as compiled by the Respondent's Interview Board, based on the performance of the candidates at interview.

In accordance with the recommendations of the Interview Board, the permanent position of porter was offered to and accepted by the first named person on the list. At the time, there were two other part-time positions for porters, available to be filled at the Respondent's premises and these positions, were offered to the persons next listed in descending order as set out in the report of the Interview Board and ultimately accepted by the second and fourth named persons named listed.

The evidence adduced before the Tribunal, both oral and documentary, disclosed that

- (a) this process commenced with advertisement of the positions in the Limerick Leader on the 10th January 2008
- (b) the Interview Board reported on the 16th April 2008 or shortly thereafter.
- (c) the permanent, whole-time and pensionable post of porter commenced with effect from the 3rd June 2008, the position having been offered to and accepted by the successful candidate on the 29th May 2008.

As the permanent position had been filled and as the Claimant was not successful in obtaining further temporary employment, he was afforded notice by the Respondent, that the purpose for his temporary employment would come to an end on the 26th June 2008 and that his employment as temporary porter with the Respondent would cease on that date.

The Evidence Of The Respondent

The Respondent's Human Resources Manager, Mr. W., testified before the Tribunal.

He stated that the Claimant, in his temporary employment as a porter, which was a general support grade, was employed by the Respondent. He outlined how porters were assigned to various parts of the Respondent's hospital premises, their main functions including the transportation of patients, equipment and supplies, notwithstanding slightly varying duties.

He testified that during the period of the Claimant's employment from 2006 to 2008, the standard complement of porter positions was of twelve whole-time appointments. The position as and from early 2006 had been the employment of twelve porters on a permanent basis and one additional porter, who was an unapproved long term temporary employee, whose position was funded from the Respondent's own resources.

In March 2006, one of the permanent whole-time porters, a Mr. B.O'R, was promoted to a position as a clerical officer with the Respondent, hence the number of porters employed was reduced to the approved level of twelve (i.e. eleven full-time positions and one long term temporary position). On the basis of the imminent retirement of another permanent porter, a Mr. M., in June 2006, porter numbers would thereafter otherwise be reduced to ten whole-time porters and one unapproved long term temporary porter.

By reason thereof, in the period from April to May 2006, a process was commenced by the Respondent to temporarily fill the positions made available as a result of the promotion and retirement of the porters aforesaid and to also obtain summer relief cover, it being the practice of the Respondent, to also provide a temporary position throughout the currency of the summer period, to cover for porters on vacation.

To that end, a Mr. Q, who had theretofore occupied the position as temporary unapproved porter, and the Claimant were recruited to fill, on a temporary basis, the positions vacated by the promotion and retirement respectively of the whole-time porters aforesaid. A Mr. K. O'R was also engaged on a temporary basis to provide holiday and annual leave relief cover referred to.

In consequence thereof, upon the departure of Mr. K. O'R at the end of the summer season, the complement of porters employed by the Respondent had reverted to the approved level of twelve and constituted ten whole-time porters and two temporary porters, those being Mr. Q and the Claimant aforesaid.

Mr. W., the Respondent's Human Resources Manager, testified that, although the Respondent had

a vacancy for a permanent whole-time porter at the time of the engagement of the Claimant, it was not in a position to offer that employment to the Claimant, as a result of inconclusive and protracted negotiations with the porters, concerning agreement upon and acceptance of revised rostering arrangements. Accordingly, the Claimant was offered a contract of employment with the Respondent, on a temporary basis until such time as the permanent post could be filled.

In the period between June 2006 and May 2007, further discussions continued with the porters, in relation to matters raised by SIPTU, concerning *inter alia* difficulties encountered in finishing work in the Accident & Emergency Department at the duly designated time. As a solution, the Respondent proposed that once the permanent whole-time position was filled, these difficulties could be resolved, by the appointment of this person as a dedicated porter allocated to the Accident and Emergency Department, whereby the existing porter complement would not be required thereafter to rotate onto the Accident and Emergency Department.

A number of meetings took place with the porters throughout this period and in September 2006 the staff rejected rostering proposals presented by the Respondent. The Respondent then requested counter-proposals from SIPTU which were discussed, but no concluded agreement was arrived at and in early 2007, the Respondent was informed that the porters did not want to engage in further discussions pertaining to the revision of rosters.

By reason of the foregoing, in May 2007, Mr. W., the Respondent's Human Resources Manager wrote to all of the porters advising that there would be no amendment to existing rosters and that the roster vacancies created by the promotion and retirement of the said Mr. B.O'R and Mr. M respectively, would henceforth be filled through an appropriate transfer process and requested that any porter interested in transferring to either of those two rostered positions should apply in writing and that in respect of the permanent whole-time vacancy available within the porter complement, it was the Respondent's intention to commence the process to fill that post by open competition in the near future.

On the 15th May 2007, the Claimant wrote to Mr. W., in respect of the roster vacancies aforesaid, requesting a transfer to a position of permanent whole-time porter. By letter dated the 5th June 2007, the Claimant was informed that it was not possible for a temporary staff member to transfer to a permanent position without competition, other than in accordance with the provisions of the Protection of Employees (Fixed-Term Work) Act 2003.

By the 20th May 2007, as Mr. Q had been continuously employed by the Respondent, he had automatically become entitled to a permanent whole-time position as porter with the Respondent, in accordance with the provisions of the Protection of Employees (Fixed-Term Work) Act 2003. Accordingly and in consequence thereof, the Respondent's porter complement then equated to eleven permanent whole-time employees and the Claimant, although upon the resignation of Mr. R., one of the permanent whole-time porters, in October 2007, the numbers again reverted to ten permanent whole-time positions and the Claimant.

In the period from June 2007 to January 2008, SIPTU had requested to re-engage with the Respondent in discussions on rostering, to which the Respondent agreed subject to progress being achieved at the initial meeting between the parties. This occurred and a successful conclusion on the rostering was finally arrived at in principle, in or about September 2007. However, at around that time, the HSE implemented a recruitment embargo in the health sector and it was not possible for the Respondent to proceed to advertise the vacancies in its porter complement until early 2008. By reason of the resignation of Mr. R, as the complement of porters was minus one, a person who had theretofore been employed by the Respondent as a catering assistant, a Mr. P., had his

contract extended and in January 2008 was appointed a porter on a temporary basis, occasioning the situation to revert to the employment of ten permanent whole-time porters and two temporary porters, namely the claimant and the said Mr. P. By way of note, ultimately, it was the said Mr. P. who, following the selection process, succeeded to the permanent whole-time position as porter in June 2008.

Following further negotiations between the Respondent and SIPTU on behalf of all of the porters, in January 2008, an agreement was arrived at between the parties, that the two temporary porter positions would thereafter be filled on a permanent basis, by the appointment of one permanent whole-time employee and two permanent part-time employees. In essence, this agreement meant that following the selection process, there would henceforth be eleven whole-time permanent porters and two part-time permanent porters, the two permanent part-time positions being the equivalent of one permanent whole-time post.

On the 9th January 2008, the Respondent again wrote to the Claimant and informed him that it was currently advertising for permanent porters on both a whole-time and part-time basis.

It is also noteworthy that on the 10th January 2008, a meeting took place between negotiating teams on behalf of the Respondent and the porters, following which, minutes of their understanding of the agreements reached between the sides at this meeting, were drafted by the porters union representatives and circulated to all porters, who were requested to sign if they agreed with the contents thereof.

A copy of these minutes, as apparently signed by the Claimant, was introduced into evidence before the Tribunal, having been given to Mr. W by the porters' union representative, so as to avoid any misunderstanding arising in respect of the discussions which had been conducted between the parties. The Claimant in cross-examination testified that he signed the document understanding his contents and that he agreed with same. He sought to explain this further by stating that he had signed the document so as to facilitate the introduction of the revised roster system and not as a formal document binding upon him.

It was the evidence of Mr. W. that this meeting was arranged to progress with the porters representatives the means of filling the vacancies in the porter complement following the lifting of the HSE recruitment embargo and how the new rostering shifts would be allocated to individual staff members in practice. Whereas theretofore, the situation which pertained had involved frequent rotation amongst staff members, one of the objectives of this meeting was to have porters assigned to specific areas and Mr. W. testified that agreement was arrived at between the parties in that regard at this meeting.

In these respects, Mr. W. testified that the porter's union/porter representatives were informed that Mr. P. would be employed as a temporary porter to fill the post created by the resignation of Mr. R. The union/porter representatives were also informed that the posts that were ultimately to be filled were one permanent whole-time built-in cover post to provide cover for the other permanent staff on leave of any sort, as well as one permanent part-time post in the Accident & Emergency Department and one permanent part-time post for the stores shift.

It appears that as at the date of this meeting, the situation which had pertained with the rostering of the porter complement allowed for one built-in cover post, which post was being occupied by the Claimant pursuant to his temporary contract of employment, whereas the new roster envisaged two built-in cover porter positions. It was in this context, Mr. W testified, that the Respondent was also requested by the porter representatives at this meeting to retain the Claimant as second

built-in cover porter, he having already been trained in that capacity, to which the Respondent appraised the porters representatives, that it was obliged to recruit for the positions by way of open competition and that the Claimant was welcome to apply for any available position.

As appears both from the evidence of Mr. W. and the minutes of the meeting as prepared by the porters representatives, the agreement arrived at specifically envisaged *inter alia*

- [Mr. P] will be the pharmacy shift porter for his short term contract thus giving the longer serving porters a break from the pharmacy shift. The porter rostered for pharmacy shift that week will act as built in cover.
- A part time hour's [sic] porter will be taken on to cover the stores shift approximately fifteen hours a week. This has been advertised in the leader newspaper...
- A part time hour's [sic] porter will be taken on to cover the late accident an [sic] emergency department approximately twenty hours a week. This post has been advertised in the leader newspaper.
- A full time hour's built in cover porter approximately thirty nine hour's a week. This post has been advertised in the leader paper

We have been promised that when these positions have been filled that the new rota will be implemented

On arrival of the above agreements in writing from the management negotiating team we have agreed to hold a vote to agree or not agree with the above points.

Furthermore, the minutes of the meeting aforesaid, as signed by the Claimant, also state in their material respects as follows

"We asked could [the Claimant] be kept on as the second built in cover porter as he was already trained. Management were unable to agree to this as they have to advertise the position and hold interviews. [The Claimant] will of course be able to interview for the position"

NEW ROTA personnel AS I UNDERSTAND IT

[The Claimant] built in cover porter temporary

Full time built in cover porter position to be filled by interview"

Furthermore, in a letter dated the 14th January 2008 from Mr. W to the SIPTU porters' representative, it is also recited in its material respects as follows,

"As you are aware there are currently two vacant permanent Porter positions one of which is filled on a temporary basis at present. I wish to confirm that Mr. J.P. will commence temporary employment as a Porter on the 24th January 2008 until such time as the permanent vacancies are filled on a permanent basis.

The permanent vacancies were advertised in the Limerick Leader on Thursday 10th January 2008. The Hospital will endeavor to expedite the process of recruiting permanent Porters to the vacant positions. The current vacancies consist of one full time (built in cover), one part time (A&E evening shift) and one part time (Stores) posts. As soon as these posts are filled the revised roster as agreed with porter staff in 2007 will be

implemented.”

The selection process to fill these three positions (one permanent whole-time and two permanent part-time) formally commenced with the placement of an advertisement in the Limerick Leader newspaper on the 10th January 2008 and concluded in May 2008 with the creation of a panel of persons to facilitate appointments to the available positions. It was from this panel that the one permanent whole-time and the two permanent part-time positions were filled, namely by the said Mr. P and by a Mr B. and a Mr. McC respectively.

In all, approximately one hundred applications for the vacant positions, as publicly advertised in the local provincial newspaper and on its website were received by the Respondent. Thereafter, a series of preliminary interviews were conducted for the purpose of selecting suitable candidates for final interview. Seventeen prospective candidates, including the Claimant, were short-listed for final interview, all of which took place on 15th April and 16th April 2008 and from this, a panel of suitable candidates for employment was created, with persons listed in accordance of performance at interview, as assessed by the prescribed criteria.

The three vacant positions were filled from this list of suitable candidates. The Claimant was the fifth named person on this list. The permanent whole-time position by way of built in cover and the permanent part-time positions in the Accident & Emergency Department and in stores were respectively offered to and accepted by the first, second and fourth named candidates listed.

Mr. W. testified that had the fourth named candidate refused the permanent part-time position as a porter in stores, it would have been offered to the claimant, as fifth named candidate on the list. Since June 2008, no further temporary porter positions have become available with the Respondent, and since that date, the porter complement has at all times been eleven permanent whole-time and two permanent part-time porters, with the two permanent part-time positions equating to one permanent whole-time position, thereby representing the full and approved complement of twelve permanent whole-time positions.

In the context of the issue to be determined by the Tribunal in the course of these proceedings, it is also notable that a meeting had taken place with the Claimant on the 20th March 2008 at which both Mr. W and the porter’s SIPTU representative were also in attendance. The purpose of that meeting according to Mr. W was to clarify the Claimant’s contractual status and that as previously advised to him, it was reiterated at this meeting that his contract of employment was a specific purpose contract to cover a vacant position pending its filling on a permanent basis.

It was also explained to the Claimant at that meeting that discussions with the porters on rostering had regrettably lasted longer than anticipated and that Mr. W. was conscious of unfairness accruing to the Claimant, by remaining on a temporary contract for an extended period of time, without any guarantee of long term employment, a point which Mr. W says he had raised in the course of the negotiations with the union representatives.

The cross-examination of Mr. W by Ms. Lane primarily dealt with the disputation by the Claimant of the actual extent of the porter complement as at March 2006 when the Claimant applied for his position and thereafter. It was suggested to Mr. W that the actual complement at that time consisted of twelve whole-time permanent employees together with one long term temporary employee, all of which were to be supplemented by summer relief cover and whilst it was conceded by Mr. W that the number of persons on the porter register as it were, may have exceeded the Respondent’s quota at times, he was adamant that the Respondent’s quota as approved was in fact twelve persons.

In this context, it was further suggested to Mr. W that in the summer of 2006, two persons were in fact appointed for the purposes of summer relief cover, although Mr. W. could only recall one such person at that time.

Mr. W was also questioned as to why the Respondent had advertised for the position of a porter in March 2006, at a time when Mr. B. O'R had departed to the clerical division, as the Respondent then had a complement of twelve porters. In this respect, the evidence of Mr. W. was that such advertisement was pre-emptive and in anticipation of the retirement of Mr. M., who in fact continued in his employment with the Respondent for a period of only two weeks after the Claimant had commenced his role and who provided the initial training to the Claimant.

It was further suggested to Mr. W that Mr. Q., the long term temporary unapproved employee was, in fact, appointed to a separate thirteenth position which had evolved with the Respondent and was not filled by way of open competition. It was also suggested to Mr. W. that the appointment of Mr. Q was to a permanent whole-time position and via a unique process which was not part of the process to which the Claimant had subscribed to with his application in March 2006. In reply, Mr. W stated that the approved complement of porters was only twelve posts regardless and that Mr Q. had been appointed to fill one of those positions, initially on a temporary whole-time basis.

It was also suggested to Mr. W. in cross-examination that when the Claimant was recruited in 2006, there was at least one anticipated vacancy in the porter complement and that a second one arose in the course of his employment and that the purpose of the Claimant's temporary contract was to allow the recruitment and permanent appointment of a porter or porters and that there should be thirteen posts because the appointment of Mr Q as a permanent whole-time employee was not anticipated at the time at which the Claimant was recruited on a temporary contract and further that as the Claimant was never informed that Mr. Q's appointment was on a permanent whole time basis subsequent to the 20th May 2007, the Claimant did not also accept that it was Mr. M's position that he was in fact occupying on a temporary basis in the events which had happened and in the light of the functions as discharged by him.

Ms. R., a Human Resources Officer with the Respondent, who commenced employment with it in March 2005, also testified on its behalf at the hearing before the Tribunal.

Whilst her evidence primarily concerned the "*acting-up*" of the porter, Mr. B.O'R to a vacant clerical officer's position on a temporary basis for the purposes of gaining experience in that position, thus resulting in the backfilling of his position from the pool of porters although he had remained on the porter complement, being paid the porter salary with an allowance for "*acting up*" as a clerical officer, until he applied for and obtained a permanent whole-time position as a clerical officer, such that ostensibly the Respondent had thirteen porters in appearance for some period of time, whereas in fact it had twelve persons performing the duties of porter, the Tribunal determines that the evidence adduced by this witness both in chief and on cross-examination by Ms. Lane, was not determinative of the issues in the case, one way or the other.

The Evidence Of The Claimant:

A considerable degree of the evidence adduced by and on behalf of the Claimant was corroborative of and consistent with the evidence adduced by the Respondent. Furthermore the Tribunal has determined that the Claimant's evidence and that of his witnesses in material respects

was not of such quality or coherence as to outweigh that of the Respondent.

In his sworn evidence, the Claimant confirmed that he understood the purpose of his contract was to back fill a post of porter until such time as that post was filled on a permanent basis and further that he was also aware that his contract of employment provided for his assignment to different departments within the hospital depending on the demands of the service, all of which the Claimant testified to in some detail.

He also confirmed that as at the date of commencement of his employment, Mr. Q and Mr. M were exercising the functions of porters and that Mr. B. O'R was not so engaged. Furthermore he testified that he was trained initially for a position of house porter, rather than in the position of built-in cover, although he effectively became built-in cover porter shortly after Mr. M's employment ceased and by the end of 2006, had trained and worked in every department within the Respondent's premises.

The Claimant outlined that he was never told that the official complement for porters was twelve and furthermore that whilst he had worked with Mr. Q., he was never informed that he was offered a permanent whole-time appointment and only learned of same through his union representative shortly before he left the Respondent's employment, that he had no notice of anything until "*my job was advertised*" in January 2008. The Claimant also testified that as at November 2006, he had been inquiring of the Respondent where he stood with it and what the future held for him and that Mr. W indicated to him that it was envisaged that the purpose of his contract would have ceased by March 2007.

It appeared to the Tribunal in the course of evidence, that the kernel of the Claimant's grievance with the Respondent, was his perception, that he was only interviewed for one permanent position, when two were required to be filled and were actually filled during the currency of his temporary contract. The Tribunal determines that this was a misapprehension on the part on the Claimant.

Furthermore, it was readily apparent to the Tribunal that the Claimant was bitterly disappointed by the Respondent's decision not to offer him at permanent whole-time position as a porter and at the manner by which his performance at interview in 2008 was rated, as he had apparently achieved a better rating when interviewed for the temporary position in 2006, notwithstanding that latterly, he then had the benefit of two years practical experience, some training and attendances at various courses which were organised by the Respondent in the interim, under his belt.

The Claimant also maintained that he was specifically hired to cover positions that had to be filled by way of open public competition and that it was never made known to him by the Respondent that a vacancy for a permanent whole-time porter could be filled otherwise than by way of open public competition. Furthermore, the Claimant testified that he did not accept that the purpose of his employment ended because porters still continued to "*double up*" in the performance of their duties and that positions remained to be filled as at the date of termination of his employment. The Tribunal does not accept that such was in fact the situation that pertained at the time.

The Claimant whilst also accepting that through union negotiation, one permanent whole-time position had evolved into two permanent part-time positions, continued to maintain that there was a further permanent whole-time position which was required to be filled. On the totality of the evidence adduced, the Tribunal does not accept that to be the case.

When it was put to the Claimant in cross-examination that the Respondent's letter to him of the 1st May 2007 highlighted an awareness in him that a permanent whole-time position within the porter

complement existed and that it was the Respondent's intention to fill same by way of open competition, the Claimant testified that he did not know what position was being referred to and that although he was a temporary whole-time employee who knew that to be made permanent, he would have to succeed by way of open competition, he felt that as he had received this letter, he was somehow entitled to the permanent position and accordingly he applied for same in due course.

Whilst the Claimant testified that the letter aforesaid was confusing to him, he admitted, contrary to his direct evidence, that as and from receipt of the Respondent's letter of the 5th June 2007, he had become aware of the complete picture surrounding the appointment of Mr. Q. to a permanent whole-time position and the manner by which such was achieved. On further questioning, the Claimant also accepted that although it appeared to treat him unfairly, it was through the operation of law that another temporary employee, Mr. Q. had succeeded to a permanent whole-time position as a porter without open public competition.

Although the Claimant subsequently applied for the permanent positions as advertised, he did not accept that the filling of one permanent whole time position and two permanent part-time posts was in accordance with the minutes he had signed in January 2008, or necessarily involved the cessation of the specified purpose for which he was employed, as he had effectively undertaken a built-in cover position for two years.

Mr. D. also testified on behalf of the Claimant.

At all material times, until a number of days prior to the hearing of these proceedings before the Tribunal, this witness had been the porters' SIPTU representative referred to above, in addition to being employed by the Respondent as a day ward porter.

This witness confirmed that he attended the meeting with the Respondent on the 10th January 2008, following which he had drafted the minutes of same referred to and circulated them to the porters. He recounted how at or about the time of this meeting there, a serious "*doubling-up*" of the work done by the porters was pertaining, which he considered had safety, health and welfare implications for both the Respondent, its employees and its patients.

He acknowledged that it was suggested at the meeting in question that the Claimant be retained as a second built-in cover porter. Essentially, when all porters were on duty, this second built-in cover porter, could be used to do casual work, if no porter work was available. He testified that as at the time of the meeting, there had not been a full complement of porters in actual day-to-day employment, as a relatively high level of sick leave was being encountered amongst personnel.

He also recounted how at this meeting, a new rota for porters was also proposed by the porter representatives, which management had agreed to consider and which included the Claimant thereon and testified that it was his understanding of the meeting that it was agreed that a second built-in cover porter was to be required in a permanent whole-time capacity.

In cross-examination, it was put to and accepted by Mr. D that by letter of the 14th January 2008, he was clearly informed that the permanent vacant positions comprising of one permanent whole-time built-in cover and two permanent part-time posts in the A & E department and stores had been advertised in the local provincial newspaper and were to be filled by public open competition, all of which reflected what had been discussed at the meeting and with which he was in agreement, as was the Claimant. He further stated that as no reference had been made in the letter to Mr. Q's previous employment as a long term

temporary employee and whilst he had always felt that twelve full-time porter positions had existed, he was now of the opinion that work for thirteen positions existed, namely twelve whole time permanent positions and the position theretofore occupied by Mr. Q and that had he realised this at the meeting on 10 January 2008, he would have pushed for the Claimant to have been retained in his position.

Submissions Of The Parties:

Ms. Lane on behalf of the Claimant, submitted in the first instance, that the Claimant's contract was of such a generic nature that it precluded being encompassed by the provisions of section 2(2)(b) of the Unfair Dismissals Act, 1977, as amended.

In this regard, it was submitted that the Respondent was not entitled to rely on the proviso contained in this section on the grounds that

- (i) it was conceded in evidence and widely known that permanent appointments to portering staff was by way of public open competition, that the complement at the time the Claimant was first engaged was twelve publicly competed for whole-time permanent positions and Mr. Q as a temporary long term employee.
- (ii) at about the time when the Claimant was offered his temporary contract in June 2006, the contract of the long term temporary employee had been renewed. Therefore having organised a competition to recruit a porter on a temporary whole-time basis, (i.e. the position which the Claimant obtained), the Respondent, by renewing the contract of Mr. Q. as a long term temporary employee, knowingly brought him within the provisions of the Protection of Employees (Fixed-Term Work) Act 2003 and by *de facto*, securing this position which was unique to him, meant that thirteen positions for porters existed with the Respondent.

An alternative submission was also made that notwithstanding the advertisements in the newspaper in January 2008 of the positions as stated at the meeting of the 8th January 2008, it was apparent from the minutes thereof and the contents of the letter of the 14th January to Mr. D that X-ray portering work was to be removed or deleted and therefore the staffing complement was not being met by the recruitment of porters for Accident and Emergency Department, stores and built-in cover, which did not equate to the staffing levels when the Claimant was first engaged in June 2006.

Accordingly it was submitted that the purpose of the Claimant's contract had not ceased, or had only partially ceased, in that Mr. Q's position was filled through the direct action of the Respondent, which had nothing whatsoever to do with an open public competition, Mr. Q's original engagement remained distinct from that of the other portering positions and the position of Mr. B. O'R remained available.

Furthermore, it was submitted that the Claimant's contract was not specific enough as to identify what post he was required to fill, so that the cessation of purpose could be independently and adequately verified.

In addition, another position, that of porter in the X-ray department, was made redundant. If this position had continued to exist, it would have been available to the Claimant and as the hours entailed by this position in the X-ray department post had diminished, as a consequence, for the purpose of the Claimant's contract, there was another part-time position available to him from the

panel.

In conclusion and by reason of the foregoing, it was submitted that a permanent whole-time post remained unfulfilled by way of public open competition, or alternatively as it was apparent from the evidence that the Respondent's staff were deployed across various departments, a position involving some portering duties also awaited fulfilment. In essence there were two vacant permanent whole-time positions as at the date of the Claimant's recruitment, those of Mr. B. O'R and Mr. M and it was disingenuous of the Respondent to proceed by way of open competition whilst similarly permitting Mr. Q's role to evolve into a permanent whole-time one.

Mr. Cooper on behalf of the Respondent submitted that the proviso contained at Section 2(2)(b) aforesaid was clearly of application to the facts of this case. In response to Ms. Lane, Mr. Cooper also submitted

- (i) There was an authorised and approved complement of only twelve permanent whole-time porter positions for throughout the relevant period, whereas thirteen persons may have been on the pay roll some time, namely eleven whole-time permanent porters, Mr. Q, as an unapproved long term temporary employee and Mr. B.O'R "acting" up in a clerical role.

In practice there was twelve, the complement was for twelve, the funding was for twelve and the Respondent wanted twelve, which was the case throughout the entire of the relevant period and that it was not the prerogative of the Claimant or his union representative to dictate to the Respondent that there ought to be thirteen.

- (ii) In so far as Ms. Lane had made reference to the diminution of the portering hours available in the X-ray department, it was apparent that SIPTU had requested of the Respondent that if such materialised, consideration be afforded to attaching the X-ray porter to the medical assessment unit to retain his hours and the Respondent had itself committed to the necessity for further discussions to consider the best use of resources that were anticipated to become available as a result of the diminution of X-ray portering work by the introduction of new technology and this aspect of the matter was a non-issue in relation to this case as it did not affect the overall number of positions to be filled by permanent whole-time porters, which had always remained at twelve.
- (iii) The evolution of the status of Mr. Q. to a permanent whole-time employee from an unapproved temporary long term employee materialised by operation of law, pursuant to the provisions of the Protection of Employees (Fixed-Term Work) Act 2003. Other temporary employees such as the Claimant may have seen this as unfair. However, it is something that he could not validly complain about in the context of these proceedings, as it did not affect his contract of employment with the Respondent.

He was contracted to "*back fill a post until this post is filled on a permanent basis*" and in fact he exercised an opportunity available to him to apply to fill that vacancy on a permanent whole-time basis. The purpose of his contract ceased to exist with the appointment of Mr. P. to the permanent whole-time position on 3 June 2008 following the completion of the open public competition and interview process. All of this was borne out by the SIPTU minutes as signed and agreed to by the Claimant

Determination:

S.2(2)(b) of the 1977 Act provides that *the [Unfair Dismissals] Act shall not apply in relation to dismissal, where the employment was under a contract of employment.....for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of.....the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that the Unfair Dismissals Act shall not apply to a dismissal consisting only of the.....cesser aforesaid.*”

In so far as the formal evidentiary requirements of s.2(2)(b) aforesaid are concerned, the Tribunal unanimously determines that such were manifestly satisfied in this case.

In so far as the substantive requirement of cesser of purpose is concerned, the Tribunal, having considered and reviewed the oral evidence of the parties and their witnesses and the submissions of their respective legal representatives, as set out above, also unanimously determines, on the balance of probabilities, that such requirement was met, on the facts of this case and that the dismissal of the Claimant in this instance, consisted only of the cesser of the specified purpose of the contract under which he was employed by the Respondent.

In these respects, the oral evidence adduced by the Respondent had a cogency, credibility, coherence and consistency that was corroborated by the documentary evidence adduced and the Tribunal unanimously determines that, on this basis the Respondent discharged the evidential burdens as lay upon them.

Furthermore, evidence elicited from the Claimant in cross-examination by Mr. Cooper, seriously undermined the assertions and contentions made by Ms. Lane in her cross-examination of Mr. W and submissions.

In particular, the Claimant admitted that, in April 2008, he was, in his own words “*interviewed for my own job of full time built in cover porter*” and that contrary to his evidence-in-chief, as a result of the letters of the 1st May and 5th June 2007, he had been readily aware that Mr. Q had, on a permanent whole time basis, assumed one of the two positions, that had become vacant as a result of the promotion of Mr. B.O’R and the retirement of Mr. M and additionally in his direct evidence had also testified that from the date on which he was recruited in 2006, he [*the Claimant*] felt that “*he was there for Mr. M’s job*” and that “*he felt that he was taking his position on a temporary basis until he was permanently appointed*” and although the duties initially assigned to him were those of Mr. M, that did not ultimately continue to be case in practice, which he admitted was the Respondent’s prerogative.

The Tribunal was satisfied that the purpose of the Respondent’s contractual obligations to the Claimant were of the nature as stipulated in the Terms and Conditions of Employment as referred to and not for an ulterior purpose so as to avoid liability, which might otherwise attach, upon cessation of the Claimant’s employment with it.

It is also appropriate for the Tribunal to take cognisance of the fact that the statutory purpose of the section was to provide a mechanism for the avoidance of liability under the Unfair Dismissals legislation, in relation to temporary contracts and the Tribunal was satisfied, on the evidence adduced before it, that the proviso was of application to the facts of this case.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed and in

the light of that determination the Tribunal finds it unnecessary to herein set out the evidence adduced by the Claimant and the Respondent in respect of the Claimant's alleged financial losses subsequent to the 20th June 2008 or the redress sought by him and to make any findings thereon.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)