

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE -*Claimant*

CASE NO.
UD1175/2008

against
EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Ennis on 12th June 2009 and 22nd October 2009

Representation:

Claimant: Mr. Gearóid Howard, Crimmins Howard, Solicitors, Dolmen House,
Shannon, Co. Clare

Respondent: Ms. Ger Moriarty, Local Government Management Services Board,
35/39 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:

Respondent's Case:

The Human Resources Manager gave evidence to the Tribunal. The respondent is required to advertise and hold competitions for available posts. Successful applicants are then placed on a panel. This process is agreed nationally throughout the country and follows procedures, which have been established for a long number of years. If there is a need to fill a post and no panel exists for that post, then an individual can be selected from curriculum vitas submitted to fill the post on a short-term basis, until a panel is formed.

The claimant filled a casual post due to the promotion of the officer in that post. The first contract given to the claimant was from the 2nd March 2007 to the 1st June 2007 inclusive. The terms and conditions of the claimant's employment stated that he was employed as a temporary general operative on a specific purpose contract due to the backfilling of positions left vacant as a result of the appointment of temporary Health and Safety Officer. The contract further stated that it was a fixed-term contract of employment and therefore the provisions of the Unfair Dismissals Acts, 1997–1993, did not apply to the termination of the contract, where the termination was by

reason only of the expiry of this fixed term. The claimant's second contract stated the same terms and was for the period from the 5th June to the 4th September 2007. The claimant's third contract again stated the same terms and was for the period from the 5th September 2007 to the 4th December 2007. The fourth contract was for the period beginning 5th December 2007 to 4th March 2008. The claimant's fifth contract was for the period of the 5th March 2008 to the 4th June 2008. Clause 25 of the claimant's contract stated that he was subject to a twelve-month probationary period during which performance would be reviewed on an ongoing basis. The claimant worked particularly in the Shannon region.

At that time the respondent had a shortage of outdoor labour. The Human Resources Manager was aware of the unfair dismissals legislation, which sets out that when an employee has twelve months service they are entitled to bring a claim under said legislation. The claimant's contract was due to terminate on the 4th December 2007. It was the intention of the respondent to have a panel in place long before this date and the unions were agitating for the formation of the panel. However, the respondent decided to defer the competition due to the imminent move to new offices. As a result the respondent knowingly made a decision to extend the claimant's contract based on service requirements throughout the Christmas period. This also provided the claimant with the advantage of partaking in the interview process as a "sitting" employee. The interviews were subsequently held on the 6th and 7th March 2008.

The respondent's engineers made themselves available for interview coaching. The respondent had many other fixed-term and temporary employees at that time and there was much discussion about the formation of the panel, as it was an opportunity. All such employees applied for a place on the panel and all were aware that if they were not placed high enough on the panel they would not succeed in securing a post. The applications were divided into two electoral areas, which meant that from four hundred applications there were three hundred candidates. The interview panels consisted of experienced engineers who assessed the competencies of the candidates. The claimant was placed eighteenth on the panel. The panel was to remain in place for a period of two years.

The respondent offered longer contracts to those at the top of the panel. The people who secured first and second place on the panel were internal candidates. Four people were employed from the panel. Two of the four employees have been retained but the other two employees were not retained due to the economic slowdown.

The claimant subsequently approached human resources requesting an appeal of the marks he had obtained during the interview process and he made this request in writing on the 11th April 2008. As the Human Resources Manager had not been involved in the interview process he thought it best to copy the claimant's letter to the interviewers for their observations. When he had received their responses he wrote to the claimant on the 24th April 2008.

The respondent was required to give the claimant notice that his employment was ending and notice was provided to him by letter from the Administrative Officer on the 1st May 2008. The Administrative Officer's letter informed the claimant that his current contract of employment as temporary general operative would not be renewed beyond the 4th June 2008. When the claimant's contract expired the respondent was obliged to appoint someone from the panel to the post.

During cross-examination it was put to the witness that the claimant was unaware that he was interviewing for his own position as the respondent has a large number of general operative posts. The Human Resources Manager replied that it was clear what job was advertised from the job

description outlined. He found it difficult to believe the claimant was unaware that it was his post he was applying for, as there were a lot of discussions at the time. The claimant had applied for the post; therefore he must have placed some value on it. Applicants were asked to select whether they wished to apply for the post of temporary general operative or casual temporary general operative.

It was put to the witness that the claimant was assured by his Line Manager that he would secure the position. The Human Resources Manager replied that the line managers could not speak for the interview board or the level of the candidates that applied.

It was put to the witness that Mr. F; one of the respondent's employees was employed in Shannon on the 23rd June 2008 to the present date in the claimant's post. The Human Resources Manager replied that the respondent was obliged to provide someone for the claimant's position when his contract was not renewed. Mr. F was exempt from applying for the Shannon panel, as he had previously partaken in the competition process for the east Clare area and had secured a place on a pre-existing panel. Mr. F was moved from east Clare to Shannon when his work in east Clare had completed. The respondent operates a mobility policy for its employees and can transfer surplus staff from another area to the Shannon region if required.

In reply to questions from the Tribunal, the Human Resources Manager confirmed that the claimant carried out the same work during each of his contracts and his service was continuous. A temporary general operative usually receives a six or twelve-month contract depending on the requirements of the engineer. The contract either terminates after this time or continues depending on service requirements.

The human resources section reviews contracts on a weekly basis and when a contract is close to an end the Area Engineer is contacted. The Area Engineer reviews the budget and service needs going forward and makes a recommendation to human resources. The fact the claimant had received a succession of contracts implied that he was performing to the standard required. The interview boards did not have sight of the claimant's probation evaluation report. There is no restriction on the number of locations that candidates can select when applying for a post. The respondent endeavours to have a panel in place at all times as this is considered best practice.

The claimant's Line Manager gave evidence to the Tribunal. He was the executive engineer over water services during the time the claimant was employed with the respondent. The vacancy in water services arose due to the workload. The claimant was employed on a temporary basis until a formal interview process was undertaken to set up a panel. A second person (Mr. D) was also employed on a casual basis in 2007.

There were some small issues with the claimant's performance during the employment. However, on the 19th November 2007 the Line Manager recommended that the claimant's contract be renewed for a further three months. It was expected that a panel would be set up before the three months had expired. The Line Manager felt that the claimant would have a better advantage at interview because of the renewal of his contract.

Towards the end of 2007 staff were notified in a newsletter of the impending recruitment competition. It was generally known that a panel was set out to fill temporary placements. The claimant enquired if it was necessary for him to partake in the interview process and the Line Manager confirmed it was. He briefed the claimant and Mr. D on the sort of questions they could expect at interview. He completed the claimant's probation evaluation

review on the 19th February 2008, and agreed that the claimant had performed to a level that would warrant his being confirmed satisfactory for employment on completion of the probationary period.

The Line Manager was aware that the claimant's employment was surpassing the twelve-month period and that there was "something" imminent about this but he wanted to give the claimant a good chance at interview. He was confident that both the claimant and Mr. D would be successful at interview. As Line Manager, he is subject to the approval of human resources, he could not therefore, have told the claimant and Mr. D that they would be successful in securing positions as alleged by the claimant. The Line Manager sat on an interview board for another location and he did not speak to the interviewers for the Shannon area. The claimant reached eighteenth place on the panel and Mr. D secured second place on the panel.

During cross-examination it was put to the Line Manager that the claimant did not know what post he was applying for and the Line Manager had not informed him that his job was at risk. The Line Manager acceded that he may not have explicitly informed the claimant that his job was at risk. It was put to the Line Manager that he had informed the claimant that attending for the interview was a safety measure. The Line Manager confirmed he had said this to the claimant but what he meant by it was that it would give the claimant security if he got the position. It was put to the Line Manager that he had informed the claimant and Mr. D that he had a final say as to who received the positions and they could be sure of securing them. The Line Manager refuted this statement.

In reply to questions from the Tribunal, the Line Manager stated that he might have unofficially expressed his dissatisfaction with the claimant to a senior engineer but he had not done so officially. Some elements of the claimant's work were below par but not enough to stall the claimant's increment.

Claimant's Case:

Giving evidence the claimant confirmed that he initially commenced work with the respondent on a three-month contract but that he subsequently received a number of contracts from the respondent. When the claimant received the letter of termination dated 1st May 2008 it upset him as he thought he would hold his position in the long-term.

The claimant became aware of the competition for the panel through a leaflet. His supervisor advised him to attend for interview, as did his Line Manager. The claimant enquired about the need for him to attend for interview but he was assured that it was a positive thing to be on the panel. The claimant did not complete an application form. He confirmed that his Line Manager conducted a trial interview with him and his manager was confident that the claimant would perform well at the interview. The Line Manager informed the claimant that "bar some kind of disaster" he had the final say. The claimant did not really know that he was interviewing for his own job. If he had known this he would not have attended for interview.

The claimant secured eighteenth position on the panel and he appealed this decision. He believed he had performed very well at interview and this was confirmed when the interviewer told him at the end of the interview that it was an excellent interview. It therefore came as a shock to the claimant to be placed eighteenth on a panel of twenty. The claimant thought that some mistake must have occurred as he had answered all the questions at length and in detail. The claimant had trained Mr. D who secured second position on the panel and who now holds a three-year general operative post. A carpenter secured first position on the panel and a farmer the third position.

The claimant's Line Manager had not informed him that he could lose his job. The claimant was not aware of any issues the Line Manager had with his work prior to hearing his evidence before the Tribunal. As he had received a positive probation report and a further contract to June 2008 the claimant thought he would be retained in the employment. He did not know that his contract would not be renewed. The claimant was unsuccessful in securing new employment.

During cross-examination the claimant confirmed he was aware that he held a temporary contract.

Determination:

Having heard all the evidence the Tribunal is satisfied that the contracts under which the claimant was employed, provided him with the requisite and continuous service for the purposes of advancing a claim under the Unfair Dismissals Acts, 1977 to 2007, as set out under S.2 of the 1977 Act, as amended by S.3 of the 1993 Act.

From the evidence the Tribunal is satisfied that the contracts, which the claimant received during his employment, did not explicitly state that the position he held was subject to the formation of a panel. In addition the Line Manager gave the claimant certain expectations of continuing in his employment. The respondent did not adduce evidence of when it communicated to the claimant (prior to the letter of the 1st May 2008) that his position would be in jeopardy due to the formation of a recruitment panel. The claimant's contract did not state that it would be renewed subject to the claimant attending for interview and securing a top position on the panel. The Tribunal finds that the respondent failed to discharge the burden of proof and finds in favour of the claimant under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal finds compensation to be the appropriate remedy but was not satisfied that the claimant had fully established his loss. The Tribunal finds the appropriate sum of compensation to be €21,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)