

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE (Claimant)

CASE NO.
UD761/2008

against

EMPLOYER (Respondent)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

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

heard this claim at Limerick on 29th April 2009

Representation:

Claimant: Mr. Donal O'Rourke B.L. instructed by Ms. Maureen Lane, Lane & Company,
Solicitors, Ducart Suite, Castletroy Park Commercial Campus, Limerick

Respondent: Ms. Rosemary Healy Rae B.L. instructed by Mr. Brendan Counihan,
Chief State Solicitors Office, Ship Street, Dublin 8

The determination of the Tribunal was as follows:

Preliminary Issue:

The question before the Tribunal was whether the claim under the Unfair Dismissals Acts was excluded under s.3(1) and/or under s.2(2)(b) of the Acts.

The claimant was appointed to the position of established clerical officer in the civil service on a probationary contract for a period of one year with effect from 20 March 2007. Both parties signed the probationary contract.

The relevant provisions of the contract were as follows:

Clause 3 provided that the probationary contract was for one year with effect from 20 March 2007.

Clause 4 provided that while the probationary contract was for a period of one year this did not preclude an extension of the said contract in the appropriate circumstances.

Clause 5 provided for review during the period of the contract to determine whether the claimant's performance and general conduct were satisfactory and that she was suitable from the point of view of health with particular regard to sick leave.

This clause further provided that prior to the completion of the probationary period a decision would be made as to whether or not the claimant would be retained pursuant to Section 5A(2) Civil Service Regulation Acts, 1956-2005. This decision would be based on her performance as assessed against the abovementioned criteria.

Clause 6 provided that notwithstanding paragraphs 4 and 5 above, the probationary contract could be terminated at any time prior to the expiry of the term of the contract by either side in accordance with the Minimum Notice and Terms of Employment Acts 1973 to 2005.

Clause 7 provided that in certain circumstances the contract could be extended and the probationary period suspended. This could arise in cases such as absence due to a non-recurring illness. The employee may make an application for an extension and any extension must be with the agreement of both parties,

Clause 8 provided that the Unfair Dismissals Acts 1977-2005 will not apply to the termination of the claimant's employment by reason only of the expiry of the probationary contract without it being renewed.

The claimant commenced employment under the probationary contract on 20 March 2007. Over the one year probationary period the claimant's sick leave record of 71.5 days in 4 absences exceeded the limits of 14 days and/or 6 absences laid down by the Department of Finance for an officer on probation. It was the claimant's case that in response to requests from the respondent she had furnished medical reports to the respondent and thereafter understood that no difficulty arose from her illnesses. The claimant had not been absent from work after November 2007. It was the claimant's position that an identified HEO of the respondent informed her that he had not been made aware of any problem with her probation at that time but when he raised the issue with the Personnel Officer he was informed that the matter would have to be raised with a higher grade officer.

The claimant heard nothing further about this issue until the 6 March 2008 when she was informed that there was a problem with her contract and it would be terminated on the 20 March 2008 unless the respondent received a letter from her doctor stating that her domestic difficulties were the cause of her illness. This was sought because while the claimant had indicated to the respondent that her doctor had suggested her absences were related to domestic difficulties there had been no such reference in the report furnished by her doctor to the respondent's Chief Medical Officer at that time and on receipt of same the question of non-recurring illnesses would be considered.

By letter dated 7 March 2008 the respondent's Personnel Officer informed the claimant that her probationary contract was due to expire on the 20 March 2008, that she would not be confirming her appointment would be recommending to the Secretary General that her employment with the respondent "be terminated from Thursday, 20 March 2008". The claimant was offered the opportunity to make final written representation before 5.30pm on Wednesday, 12 March 2008 and to meet the Personnel Officer.

In her letter of response dated 10 March 2008 the claimant indicated that she wished to appeal the

decision not to offer her a permanent position and requested an extension to her probationary contract. She further stated, *“the doctor has advised me this is a once off illness contributed(sic) by moving house and adjusting to a new job in a new location, and also due to caretaking of my child”*. Her doctor’s letter to this effect was submitted to the Tribunal.

Following a meeting with the claimant and her representative on 12 March the Personnel Officer wrote to the claimant on 13 March 2008, advising her that her appointment was not being confirmed as she had failed to meet the conditions of probation with regard to sick leave and that the recommendation not to confirm her appointment has been upheld by the Secretary General. The letter concluded with the statement: “Therefore, I wish to inform you that your employment with this Department ceases with effect from Thursday 20 March 2008”.

The claimant was on annual leave on 14, 18 and 19 March 2008 and was paid up to 19 March 2008. The P45 issued to the claimant cited the date of termination of her employment with the respondent as 19 March 2008. Whilst the claimant submitted that she subsequently wrote to the respondent requesting it to re-issue a new P45 showing 20 March 2008 as the date of termination for employment. It was the respondent’s case that it had not received any such letter.

The claimant contended that the respondent’s handling of the matter left her with insufficient time to seek suspension of her contract or to appeal the respondent’s decision.

Determination

Before the Tribunal can consider the fairness or otherwise of a dismissal under the Unfair Dismissals Acts 1977 to 2007 it must first satisfy itself that it has jurisdiction under the Acts.

Both parties accepted that S.3(1) of the Acts applied. It provides:

“This Act shall not apply in relation to the dismissal of an employee during a period starting with the commencement of the employment when he is on probation or undergoing training

(a) if his contract of employment is in writing, the duration of the probation or training is 1 year or less and is specified in the contract.”

Thus, to come within the exclusionary provisions of the section

- (i) the contract must be in writing
- (ii) it must be signed by both parties, and
- (iii) the duration of the probationary period must be 1 year or less.

It is clear from the submissions that conditions (i) and (ii) are satisfied. The contract specifically stated that the probationary contract was to be for the period of one year with effect from the 20 March 2007. However, the respondent contends that the claimant’s employment was terminated on 20 March 2008, taking her outside the 1 year as stipulated in condition (iii) and that thus the Acts applied to the dismissal and the Tribunal had jurisdiction to hear the claim. The claimant commenced employment on 20 March 2007. It is well established law that a year ends on the day before the date of the anniversary of the event (*McGown v McLoughlin* [2000] ELR10 and *Pinkerton v Radio Tara Limited* UD 212/97. Thus, to avail of the of the exclusionary provision the respondent must establish that the claimant’s probationary contract, not having been extended, ran from 20 March 2007 to 19 March 2008.

The claimant's probationary contract was for the period of one year *with effect from 20 March 2007* (emphasis added). In her letter dated 13 March 2008, which was the letter informing the claimant of the termination of her contract with the respondent, the Personnel Officer stated, "Therefore, I wish to inform you that your employment with the Department *ceases with effect from 20 March 2008* (emphasis added)." The Tribunal accepts the respondent's submission that the words be given their natural and ordinary meaning. It further accepts its submission that:

The Concise Oxford Dictionary defines the phrase "with effect from" as meaning "coming into operation at or on (a stated time or day)". In this case the phrase meant that the cessation of employment came into operation or began on the 20th March 2008. In other words the Claimant was not required to attend for work as and from the 20th March 2008 because her employment had ceased with effect from that date. This means that the date of dismissal was the 19th March 2008 because that was the last day of her employment.

Furthermore, the claimant's probationary contract was expressed to be for a period of one year *with effect from 20 March 2007*. Applying a consistent interpretation to the phrase, if the claimant's employment commenced on 20 March 2007, as was common case in the parties' submissions, then interpreting the phrase "*ceases with effect from 20 March 2008*" in the letter of 13 March 2008 must mean that the cessation of employment commenced on 20 March 2008. It follows that the last day of the employment was 19 March 2008 and accordingly the employment did not continue outside the one year specified in s 3 (i) (a). In addition both the pay and annual leave entitlements of the claimant were calculated up to 19 March 2008 and the P45 issued to her showed her date of leaving as the 19 March 2008. The contract ended in accordance with its terms and in such circumstance the provisions of the Minimum Notice and Terms of Employment Acts 1973 to 2005 do not apply. The respondent's decision not to retain the claimant was taken, in accordance with clause 5, prior to the completion of the probationary period.

For the reasons set out above the Tribunal is satisfied that the date of dismissal was 19 March 2008. Accordingly, as the three conditions set out in s 3 (i) of the Acts are satisfied, the claim is excluded and the Tribunal does not have jurisdiction to hear the claim in this matter.

The issues raised by the claimant as to the late notification by the respondent of its decision, the inadequacy of the time to make an appeal or to apply for an extension of the probationary period as well as the reason for not confirming the claimant's appointment go to the issue of the fairness or unfairness of the dismissal.

S 3 (i) of the Unfair Dismissal Acts is a stand-alone section dealing with employees on probation or undergoing training. Having reached its decision under that section the Tribunal does not find it necessary to consider the preliminary issue under S 2 (2) (b) of the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)