

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE – *claimant*

UD210/2008

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy SC

Members: Mr J. Hennessy
Mr B. Byrne

heard this claim at Kilkenny on 17th July 2008, 29th October 2008 and 20th April 2009

Representation:

Claimant(s): Mr. Stephen O Sullivan BL instructed by Mr Tony Canny, J.A. Canny & Co,
Solicitors, Friary Street, Kilkenny

Respondent(s): Mr Don Culliton, Local Government Management Services
Board, Olaf House, 35-37 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:-

Background

The representative for the respondent outlined to the Tribunal that the claimant joined in 1977 and that the retirement age was fifty-five. The claimant was one of the first full time firemen to be employed. In 1990/1991 the issue of retirement was addressed. In or around 2005/2006 the union was engaged on the issue. The union accepted a Labour Court recommendation that retirement age should be fifty-five and the claimant was bound by that.

Counsel for the claimant outlined to the Tribunal that the claimant was a full time fireman and that normal retirement age was 65. The claimant was not given a contract of employment on joining. On 9 February 1990 the retirement age was sixty and the claimant did not have a contract. Firemen in Cork, Limerick and Waterford remained in work until age 65. The

claimant was informed on 13 May 2005 that retirement age was 55. The claimant was not bound by the Labour Court recommendation; it was a recommendation, which the claimant never accepted. The claimant expected to work until he was 65.

Claimant's Case

PC a full time fireman in Galway told the Tribunal that he was appointed in 1975 and had a retirement age of 65. There was a general rule in 1971 that retirement age was 65 but that changed in 2000. He took a promotions claim, as on reaching 55 he could not apply for the position of sub officer and he was successful in his claim.

TMcD told the Tribunal that he was a full time fire fighter in Dublin and he commenced in 1982 and has a retirement age of 65. He was promoted to sub officer in October of 2007 and his retirement age is still 65. The situation changed in 1996 and retirement age was 55.

In cross-examination asked how many had contracts for retirement age of 55 he replied whoever joined after 1996, which was approximately 50%. For the first time in 1996 the Terms and Conditions agreed in relation to retirement age was 55. The fire fighters went to the Department of the Environment and the outcome was there was no veto for the age to be changed. They reverted to Dublin City Council and were informed that the retirement age should change from 55 to 58, they were told to discuss the matter.

GC told the Tribunal that he was employed in 1973 as a retained fire fighter in Dundalk and in 1979 he was a full time fire fighter. He had no retirement age and in 1999 he agreed that the 10 oldest had a retirement age of 65. He retired in 2006 when he was 60 but he could have remained in employment until he was 65. He was in contact with the claimant.

In cross-examination he stated that he consulted with the claimant in 1999 and they discussed what was going on at the time and the issue of pay did not come up at that stage. Kilkenny firemen looked for parity and this was agreed in 1998.

MK told the Tribunal that he commenced employment with the respondent as a full time fireman at the same time as the claimant. He was the first full time fire fighter in Kilkenny. He was told verbally and then by letter that retirement age was 55 and by the time this was completed he was nearly 57. After the Labour Court recommendation nothing happened and they were going to go on strike. He had received a letter from the respondent and he had no choice but to accept it. He was given instruction to retire and there was no sanction from the union. He agreed to accept the Labour Court recommendation and it would give him longer service. He requested his union representative DH to write to the respondent to advise them that he had accepted the Labour Court Recommendation. He instructed the claimant to go to the union on his behalf. This was a letter for him and him only and the same applied to his two colleagues.

In cross-examination he stated that three fire fighters were employed full time. Asked why he spoke to the claimant and not the union he replied that he went to the shop steward for as long as they were employed since 1977. He told him that he accepted a ballot and there was a ballot before the union sent the letter. He was in contact with his union representative DH and he did not know when he sent the letter. The respondent notified him in writing that his employment was ending. He remained in employment beyond the age of 55 to support the union claim. When

the strike was not sanctioned the matter could not go any further. He was not aware in 1977 that all employees who joined in 1971 had a retirement age of 55. Retirement age was not specified when he joined and he assumed it was 65. It was his understanding that the Labour Court Recommendation was taken on his behalf. He did not have 30 years service and he was not aware if he was replaced.

The claimant told the Tribunal that he joined the respondent on 28 October 1977. He, along with two others joined at the same time. He worked from 8a.m. until 5p.m. Monday to Friday and he checked equipment and undertook clerical officer duties. The three full time fire fighters had full time duties to undertake. The claimant and MK were previously employed by the OPW. They sought Terms and Conditions of employment. He queried his pension and in a reply from the county secretary there was nothing to indicate that retirement age was 55. Shortly after this he was placed on a superannuation scheme and no retirement age was specified. His brother who was a retained fire fighter retired at age 60 in November 2005. In one sub-station an employee was retained until he was 72. He was informed in 1985 on foot of a Labour Court Recommendation that the Department of Environment wished to impose a retirement age of 55. In 1977 he spoke to HC and he asked if the situation applied to him and the claimant was told that he had the same retirement age as council employees. It was never indicated to him that retirement age was 55. He contacted BM, a shop steward and concluded that no agreement was referred to the Labour Court. It was the custom and practice up to 1985 that fire fighters would retire at 65 and after 1990 retirement age was 60. A meeting took place with the branch secretary DH regarding the Labour Court recommendation, which was rejected. A meeting was also held with HR to see if agreement could be reached and the last thing they wanted to do was to go on strike. The respondent was not prepared to move in any direction.

DH, his union representative sent a letter to the respondent on 21 July 2006 in which he advised that full time firemen were accepting the outcome of the recent Labour Court recommendation but the claimant stated that these were not his instructions to DH. He told DH that he had not accepted the Labour Court Recommendation. MK told him that he had accepted it and C the other fireman said it did not matter as he had 30 years service.

MK wanted to accrue full pension rights and he asked the claimant to contact DH for a copy of the letter of 21 July 2006 to the respondent. The claimant never received a copy of the letter dated 21 July 2006. DH asked about C and he said that he did not accept or reject it. He received a letter from the assistant senior executive officer on 14 August 2006. This letter confirmed that the claimant and his two colleagues had accepted the outcome of the recent Labour Court recommendation. The claimant did not accept the contents of the letter and he did not sign the enclosed form confirming the new and amended retirement date. He recalled speaking to DH before the letter was sent. He retired on the 28 October 2007.

He applied for a number of jobs since and he did a course with Kilkenny VEC. He is presently in receipt of a job seekers benefit. He registered with FAS. He did not train in fire prevention and he did not offer his experience as a fire-fighter to any company.

In cross-examination he stated that he joined the respondent in 1977. In 1980 he was spokesman for full time fire fighters and he was appointed shop steward from 1985 to 1988. He did not receive a copy letter dated 9 February 1990 from the county secretary at the time, TB to the Branch Secretary, JMcG regarding retirement of retained firemen on age grounds. He could not

swear that he was aware of the content of the letter sometime after that. When it was put to him that he left before the new secretary came in he replied that he could not serve two purposes and there was a conflict of interest between both. Asked if accepted that all firefighters must retire at 55 he replied that it did not mention names. He told DH that he was not accepting the Labour Court Recommendation four to five weeks after the ballot.

The claimant stated that in a letter dated 16 July 2007 addressed to AD Assistant Senior Executive Officer he did not enclose the Labour Court Recommendation. He told the chief fire officer that he never accepted the Labour Court Recommendation, he did not write to the chief fire officer, he told him verbally in 2006. He reiterated that he told DH that he would not accept the Labour Court Recommendation. Prior to DH writing the letter he told him that he would never accept the Labour Court Recommendation. He told the Industrial National Secretary in October 2006 that he would not accept the Labour Court Recommendation.

Respondent's Case

TB told the Tribunal that he was assistant county secretary in 1984 and he retired in February 1994. He was involved in the day-to-day running of the Council and had responsibility for roads, sanitary services, engineers and fire brigade. The respondent had three full time firemen in 1977 and he was not involved in contracts of employment. It was the only local authority that had appointed full time firemen

On 9 February 1990 he wrote to the branch secretary of the trade union JMcG regarding the retirement of retained firemen on age grounds. The 55 age limit was introduced in 1971. Prior to 1971 there was no age limit specified in the conditions of employment. When firemen reached their 60th year the respondent knew how many people were leaving and it was six months before it could convene an interview board. He wrote a letter to PC the then branch secretary on 26 April 1991, as he wanted to make clear what was agreed and what the position was. All full time firemen must retire at 55. He could not recall if he received a response to the letter and the other matters, which were addressed in the letter were medical examinations for retained firemen and one hour off for firemen.

In cross examination asked if he could point to an agreement that full time firemen retire at 55 he replied he could not. Asked if there was an oral contract between employer and union he replied it was not an oral agreement. There was no age limit in the contract of employment in 1971 and the respondent did not employ full time officers after that. After 1971 it was documented in the conditions of employment of retained fireman that they had to retire at 55.

DH told the Tribunal that he was branch organiser in the union in Kilkenny and represented full time firemen in August 2005 until October/November 2006 and again in March/April 2007 until the present. He dealt with retirement issues. He was involved in a case in the Labour Relations Commission where a fireman wanted to work until age 65. The case was referred to the Labour Court. The Labour Court made a recommendation that retirement age should be 55. It was agreed that there was no retirement age mentioned in the contract. He dealt with the recommendation and there was a disagreement when the recommendation was issued which stated that retirement age should be 55. There was huge sympathy and it was agreed that part time firemen could work until age 58 and full time firemen should retire at 55. He met with the three members concerned and balloted on a recommendation. He contacted management and had

a meeting with the chief fire officer and management. He balloted members for industrial action and there was a unanimous vote in favour of strike.

He had a huge concern about the dispute. On 29 June he had a meeting with management and they put forward 58 as retirement age as an interim measure. The claimant and DH spoke about the matter, and finally the three members agreed to accept the Labour Court recommendation. He spoke personally to the claimant and following his discussion he wrote the letter of 21st July, 2006:

“This is to advise that S.I.P.T.U. full-time Firemen are accepting the outcome of the recent Labour Court recommendation. So, as per our agreement we trust you will advise Mr. Martin Kavanagh that he is to continue on in his employment after July 2006 as per the Labour Court recommendation”

He wrote to the chief fire officer on 8 October 2007 and advised him that the claimant was not accepting his retirement age of 55 following the Labour Court hearing. The claimant remarked to the witness that he was not prepared to accept the Labour Court Recommendation

MB senior executive officer told the Tribunal he was senior officer in Human Resources from January 2005 to July 2006. One of the firemen was due to retire and management wrote to the individual in question regarding his retirement. In late 2005 a dispute arose with the union and management met with the union official DH, but no agreement was reached. The union requested that the matter go to the Labour Relations Commission. The local authority accepted the Labour Court Recommendation and supported the union’s view. He was not aware that the matter was discussed at national level. After the Labour Court Recommendation was accepted the local authority wrote to the union. The position of the respondent was that the Labour Court Recommendation would be implemented after that. Fire fighters threatened to take industrial action, but the dispute did not happen. He left in July 2006 and he could not recall what occurred after he left.

In cross examination he stated that he could not comment on the fact that in 1977 the claimant was employed as a full time fireman and it was normal for him to retire at age 65. The claimant’s contract was silent on retirement age. He was not aware that the claimant had a discussion with HC in 1977 about his retirement age and was told that it was the same as all County Council workers. It was the custom and practice that fire fighters retired at 55. The national position was that firemen retire at 55 and the Labour Court Recommendation was 55. If the claimant was a retained fireman he could remain in employment until he was 58.

CC told the Tribunal that he joined the respondent in 1982 as a fire prevention officer and in November 1994 he was appointed chief fire officer. From 1971 onwards anyone who joined the fire services had a retirement age of 55. In 1989 he was aware of an issue but was not involved in a move to retire all retained fire fighters at 55. People who joined prior to 1971 were not an issue and there was no condition on their employment regarding retirement and they could continue until age 65. The respondent had negotiations with the union at the time. The issue of retirement age of full time fire fighters was never discussed or raised. He was aware that the union accepted the outcome of a Labour Court Recommendation.

In cross-examination he stated that he may retire at 55 but he can remain until 65. As far as he

was aware when he joined in 1982 the retirement age was 55. Nothing was sent in writing to full time firemen until they approached age 55. The claimant joined in 1977 and CC would have seen many retained firemen work beyond 55 and some worked beyond age 65. The majority of county councils accepted 55 as retirement age. There were ongoing issues with firemen who joined without a retirement age.

HH told the Tribunal that he was an administrative officer with the respondent and had responsibility for Human Resources and the corporate department. He informed the claimant in a letter that the retirement age was 55 and the Labour Court Recommendation referred to a retirement age of 55.

MD told the Tribunal that he was senior executive officer in Human Resources. He was of the opinion that the respondent did not accept that the claimant was entitled to stay until 65. He was aware that the union accepted the Labour Court Recommendation. He ensured that the claimant and his colleagues accrued full pension rights before retiring. He was aware that the claimant retired on 28 October 2007 and he was allowed to complete 30 years of full service. The claimant did not sign the confirmation of acceptance. He was not aware that the claimant never accepted the Labour Court Recommendation.

In cross-examination he stated that the Labour Court Recommendation was accepted by the respondent.

Closing Submissions

Mr. O'Sullivan for the claimant stated that the 2002 collective agreement did not apply to the claimant and brought to the attention of the Tribunal the judgement of the High Court in the case of Patrick Reilly v Drogheda Borough Council. It was submitted by Mr. O'Sullivan that this judgement indicated that Mr. Reilly did not acquiesce in the 2002 collective agreement and that point is relevant when considering this case. He further stated that his client denies that he gave authority to his union to accept the Labour Court recommendation, and never agreed to his retirement age being reduced to less than 65 years of age.

Mr. Culliton for the respondent stated that the retirement age for all firemen in Kilkenny after 1971 was 55 years of age. This position was confirmed by way of letter from the county secretary to the branch secretary of SIPTU on the 26 April 1991. The claimant could have had no expectation of a retirement age beyond 55 years of age. The claimant entered the fire service in 1978 and his retirement age was 55. This position did not change. The claimant informed his trade union official that he accepted the Labour Court recommendation, he acquiesced fully in the whole process and was bound by the collective agreement.

Determination

The letter of 21 July 2006 is central to the case. The respondent relied on that letter and argued that the claimant was bound by it. The claimant said that this letter did not reflect his instructions to the union. The union official's evidence was that the claimant told him he agreed to accept the recommendation, and that he wrote the letter following this discussion. Having regard to specific evidence given by the claimant in relation to a document, the Tribunal found his evidence unsatisfactory and prefers to accept the version given by the trade union official. The Tribunal

therefore finds that the claimant did accept the Labour Court recommendation and is bound by that.

As the Tribunal finds that the claimant did accept the Labour Court recommendations the facts in this case are quite different from those in *Reilly v Drogheda Borough Council*.

The claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)