

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE *-claimant*

CASE NO's.

RP305/2009
MN303/2009
WT125/2009

UD302/2009

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL
Members: Mr. L. Tobin
Mr G. Lamon

heard this claim at Wicklow on 20th October 2009
and 3rd December 2009
and 20th January 2010

Representation:

Claimant: Alan Haugh B.L., 16a Kindlestown Lr, Greystones, Co.Wicklow

Respondent: Ms Geraldine Moriarty, BL, Local Government Management Services Board, 35-39
Ushers Quay, Dublin 8

Background:

The respondent is a County Council. The claimant was employed by the respondent as a manager in a tourist/visitor centre.

Preliminary point:

The Tribunal decided to hear evidence on a preliminary point, which was as to whether the Tribunal had jurisdiction / whether the claimant was under the ambit of the Unfair Dismissals Acts, 1977 to 2007.

Opening arguments:

The respondent contends that the claimant's fixed term contract ended. Also that the contract contains a waiver regarding the Unfair Dismissals Acts.

The claimant contends that there was no subsisting contract in place at the time of the dismissal and therefore the respondent could not rely on a waiver.

Respondent's case:

The Tribunal heard evidence from a witness (JL) for the respondent. He explained that he took over responsibility of the tourist/visitor centre circa June 2005. He was aware that the claimant was on a temporary contract.

A memo dated 16th January 2007 was opened to the Tribunal. TM, Director of Services Enterprise and Corporate Affairs sent this memo to the witness requesting a recommendation about the renewal or non renewal of the claimant's contract. The witness responded to this by e-mail dated 23rd January 2007. The witness then spoke to the claimant and told him that he was extending the claimant's contract. Another memo referred to the respondent seeking an extension. The witness agreed with this and told the claimant that his contract was being extended.

At some time after February or March 2007, the claimant told him that he had not received a new contract. He told the claimant to go to HR department. At a later time he asked the claimant if he sorted out the situation. The claimant told him that as far as he was concerned he "was out of contract so therefore he was permanent".

The witness told the Tribunal that there was some concern about the claimant's address, (there was a problem with the claimant's address in that they might not have sent the contract or material to the claimant or that he wouldn't receive same). The witness was asked if he ever "inferred" that the claimant was a permanent employee. He replied that he did not have the power to do that.

Cross-examination:

Documents opened in cross-examination stated that the claimant was employed on a fixed term contract which would expire on 14th March 2007. Document dated 10th March 2008 approved the renewal of the claimant's fixed term contract up to and including 31st January 2009. It was put to the witness that this letter of 10th March 2008 was unsigned and it was an important letter. The witness replied that he would initial a copy of letters. He did not recall discussing the letter of 10th March 2008, with the claimant. The claimant just told him that the respondent did not extend his contract.

The witness was asked about his knowledge of the claimant address and matters connected with same.

The Chairperson of the Tribunal asked for clarification regards the contract situation i.e. the claimant's original ran from 15th March 2005 to 14th March 2007, and that from then until March 2008 there was no attempt to renew contract – the witness replied that in January 2007 he recommended that the claimant's contract be extended, however he himself did not work in the HR department (that he could recommend only and not renew the contract). The Chairperson stated that she would leave the question for Ms BB (HR person).

When asked the witness explained that the respondent had two different addresses for the claimant finance unit and personnel unit had a different address for the claimant.

The witness was asked if the claimant's contract was renewed in 2007, he replied, "It doesn't appear that it was".

The Tribunal heard evidence from a witness, BB, for the HR department. She explained that she was the personnel officer for the County Council. She was involved in the renewal of contracts, and Terms and Conditions of employment. She forwarded a draft of the contract to the claimant in March 2005 and she then phoned the claimant. She then sent another copy of the contract. The claimant understood that the contract was for a two year fixed term. During the two years the claimant did not contact her regarding his terms and conditions of employment.

A second memo recommending the renewal of the claimant's contract was opened to the Tribunal. The witness was asked why a second memo was sent out and she explained that it was because JL's memo did not contain all the information.

The witness was asked if she was satisfied that the claimant's contract was renewed in 2007, she replied that she was because discussions took place between the claimant and JL. Also on 10th March 2008 a letter of renewal issued to the claimant.

The witness asked if the claimant was a fixed term employee from the HR department's point of view and she agreed that this was so.

Cross-examination:

It was put to the witness that the claimant's contract was due to expire in March 2007, and she was asked if she wrote to the claimant before that date, the witness replied, "No". The witness accepted that the claimant was not informed in writing regarding his contract renewal. The witness confirmed that the written details of the contract did not issue in writing. The witness also confirmed that there was no signature on the letter of 10th March 2008. The witness accepted that "it was one year late (in offering contract?)". The witness stated that the claimant was informed verbally, however she accepted that it was not apparently in accordance with the Act.

Claimant's case:

The Tribunal heard evidence from the claimant. He was asked if he received a new contract when his initial one expired and he replied in the negative. He also explained that his manager (JL) said that "it" (the contract) would have to be checked out by the HR department but he did not contact the HR department. He did not receive a letter with a new contract or mentioning a new contract.

Cross-examination:

He explained that he did not raise the matter with HR department as it was up to the HR to raise the matter with him.

Preliminary Issue Determination

The claimant was employed by the respondent as the manager of the tourist/visitor centre. He was employed on a two year fixed term contract commencing on the 15th March, 2005 and terminating on the 14th March, 2007. In March 2007 internal county council discussions took place between TM and JL about the renewal of the claimant's contract. Those discussions went as far as JL recommending that the claimant's contract be renewed but nothing happened after that. The claimant's contract was not renewed and no notice of any kind pursuant to section 8 of the Protection of Employees (Fixed Term Work) Act 2003 issued. The claimant however remained on in his employment and worked under the same terms and conditions as he had for the two previous years. In March 2008 the respondent attempted to renew the claimant's contract for a period of ten months. The Tribunal accepts that the respondent's actions/inactions were not an attempt to circumvent the Act. It also accepts that the non-renewal of the claimant's

fixed contract was nothing more than an oversight.

The Protection of Employees Fixed Term Work Act 2003 seeks to guard against the potential abuse of successive fixed term contracts. The term contract of indefinite duration is not defined in the 2003 Act, but it has been judicially defined outside the context of the 2003 Act as meaning no more than a contract terminable upon the giving of reasonable notice.

The claimant had completed his second year of continuous service in March, 2007. At that juncture the respondent did not renew his contract and did not comply with its obligation pursuant to Section 8 (2) of the Act *“Where an employer proposes to renew a fixed-term contract, the fixed term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal.”* The Tribunal are satisfied that whilst a breach of Section 8(2) does not automatically give the claimant a contract of indefinite duration, that coupled with the fact that his contract was not renewed within a reasonable time and that the claimant remained on under the same terms and conditions for a period of twelve months does. Whilst the facts of the claimant’s situation do not fall square within Section 9(1) and 9(2) of the Act, it is exactly this type of abuse, albeit unintentional, that the act was designed to protect.

The Tribunal concludes that the claimant’s contract became a contract of indefinite duration in March, 2008.

In light of the determination in respect of the preliminary issue, the respondent acknowledged the claim under the Minimum Notice And Terms of Employment Acts, 1973 to 2005 and conceded notice.

Respondent’s Case

The Tribunal heard evidence from JL, witness for the company. JL was Director of Services with responsibility for running the tourist/visitor centre in which the claimant worked. JL explained that the claimant was aware of the financial situation within the company and that the tourist/visitor centre was required to break even annually in order to continue operating. The tourist/visitor centre generated income from the café, shop and public fees. JL said that the tourist/visitor centre never broke even and a subsidy was always required. JL said that the claimant was aware of this situation.

JL told the Tribunal that the claimant was the only full time member of staff in the tourist/visitor centre and that other staff were brought in to work for the summer season. JL said that the claimant was responsible for income and expenditure within his section.

In 2008 the financial situation changed and the tourist/visitor centre was in a deficit situation of €570,000. Until this point the company had been allowed to run a deficit on a year-to-year basis but were now being informed that this could not continue. The County Manager told everyone that all budgets were to be adhered to. At this time there was also an issue of salaries/payroll reduction of 3%. This instruction came from government in August 2008.

JL told the Tribunal that preparation for budgets for the following year starts in September/October and they are presented to members in late December. In the budget report presented to members in 2008 there was no proposals put forward in respect of the tourist/visitor centre.

At a meeting in January 2009 JL said there were 3 or 4 different factors to be considered.

The County Manager was under pressure in relation to the 3% reduction required and told everyone to reduce budgets to 95%. The next issue was the claimant's area of work, the tourist/visitor centre running over budget. JL explained that it's always an option at that time of year to cease operations in the tourist/visitor centre in which the claimant was employed. JL said that he explained the company's estimate process to the claimant and that the claimant was aware that the tourist/visitor centre may not continue to operate in 2009. JL quoted a report submitted from the claimant "I would like to point out at the outset that I fully understand that ***** cannot operate in the 2009 season as it has done in the past". The report went on to say "In relation to the option of not closing the *****"

JL said that the claimant was aware that the County Manager was considering closing the tourist/visitor centre. JL approached the claimant to enquire if he would be interested in forming his own company and taking over the operation of the tourist/visitor centre. The claimant told him that he would not be in a position to apply for tender. JL said that the claimant expressed concern about redundancy if the tourist/visitor centre were to cease operating.

JL told the Tribunal that management decided on 22nd January 2009 that the tourist/visitor centre would go to tender. The County Manager signed an order on 29th January 2009 approving the outsourcing. At the meeting of the 22nd January JL discussed the issue of staff with the County Manager, specifically WK, the claimant. The decision reached was that the claimant's contract would not be renewed because the respondent would no longer be operating the tourist/visitor centre.

On 23rd January 2009, TM, Director of Services, wrote to the claimant informing him that his contract was due to expire on 31st January 2009 and therefore his employment with the company would terminate with effect from 31st January 2009. On receipt of this letter the claimant told JL that he was very disappointed and he was the only employee losing a job in the County Council.

JL told the Tribunal that the claimant's employment ended on 31st January 2009. On 1st February 2009 the caretaker changed the locks and the alarm on the tourist/visitor centre. Due to public pressure to open the centre, a separate Local Authority reopened the centre on 1st April 2009. They employed their own staff. The County Council still own the building but have no operating functions or staff employed.

Cross Examination

When questioned, the witness, JL, told the Tribunal that he was not aware if there was a Manager currently employed in the tourist/visitor centre. JL did not agree that a conversation that took place, between himself and the claimant, in relation to tendering, was on 27th January 2009. JL told the Tribunal that he was 100% sure the conversation took place prior to the claimant's dismissal.

In relation to discussions and reports that took place between December 2008 and January 2009, JL confirmed that the claimant did not demonstrate that the tourist/visitor centre could be run successfully and profitably and one of the reports showed the gap between income and expenditure widening. JL agreed that the final report submitted by the claimant showed that the tourist/visitor centre could break even but the claimant had been told to break even from the start. JL accepted that as director and manager he was responsible for speaking to the claimant about deficits.

JL agreed that options were put to the claimant in respect of his employment, one of which was to take a reduction in pay of approximately 26%. JL felt that this proposal was reasonable based on all reductions being implemented. JL confirmed that the claimant sent him an email the next day

requesting details of the options discussed in writing. JL disputed that there was an ultimatum put to the claimant and did not provide the options to the claimant in writing because that would be a HR function that he did not hold.

It was put to JL that a meeting took place with the claimant on the 23rd January 2009, after the decision was taken to close the tourist/visitor centre. At this meeting the claimant presented JL with his final report. JL could not remember the date of this meeting but remembers asking the claimant if he was changing the report significantly and the claimant said he was not.

In relation to a memo dated 26th January 2009, in which the JL recommends that the operation of the tourist/visitor centre be put out to tender, he did not seek advice about whether the Transfer of Undertakings regulations would apply. JL felt this was a HR issue.

JL confirmed that he presented a report on the tourist/visitor centre to elected members on 9th February 2009. He informed members that there had been a drop in visitor numbers between 2007 and 2008. JL did not inform the members that there was an increase in income year on year and when questioned on this, he conceded that there was an increase in income but that there had also been an increase in expenditure for the same period

When asked about the Council establishing a Limited Company to operate the tourist/visitor centre, JL explained that this had been done with the local swimming pool and he did consider it for the tourist/visitor centre but he was not confident that the centre could break even.

JL agreed that, as the claimant's manager, he approved the innovations introduced by the claimant along the way on the basis that they would generate income for the County Council.

The Tribunal heard evidence from TM, Director of Services in Enterprise & Corporate Service. TM told the Tribunal that the function of the E&C Department is promotion of the County, recruitment and all staff matters. TM was not directly involved in the recruitment of the claimant. TM told the Tribunal that the position of manager in the tourist/visitor centre was filled on a temporary fixed term contract because it was an area that was under constant review. It was not a core area such as water, roads etc. If the County Council were to fill the position on a permanent basis, sanction would be required from the Dept. of Environment, Heritage and Local Government.

In relation to the non-renewal of the claimant's contract, TM told the Tribunal that he was called in to a meeting with JL and the County Manger and the decision had already been made about the closure of the tourist/visitor centre. His input was not sought into that decision.

On the basis of the decision to close the centre, TM wrote a letter to the claimant informing him that his contract would end on 31st January 2009. TM did not receive a response to his letter of dismissal dated 23rd January 2009. He wrote to the claimant again on 30th January 2009 informing him that he was being made redundant. TM told the Tribunal that when the County Manager decided on 29th January 2009 to put the tourist/visitor centre out to tender the Local Authority were advised that this created a redundancy situation and hence TM wrote to the claimant on 30th January 2009 informing him that the position of Manager was now being made redundant.

On the 2nd February 2009 the claimant responded to TM's correspondence, advising that he did not accept that a genuine redundancy situation existed or that he was fairly selected for redundancy. In this letter, the claimant also advised that he would pursue all claims open to him before the Employment Appeals Tribunal.

TM told the Tribunal that once the decision was taken to put the tourist/visitor centre out to tender it was clear that the claimant's position was redundant. The claimant was the only full time member of staff in the centre. There was no option of selecting another member of staff and the other staff affected by the decision were temporary. These staff were written to and a number of them received redundancy payments where applicable.

TM told the Tribunal that there was no vacancies within the County Council at the claimant's level and the County Council could not create another position at that level because it had been told to cut the payroll by 3%. TM confirmed that there has been no staff employed by the County Council to the tourist/visitor centre since the claimant's dismissal.

TM told the Tribunal that in the intervening period, the Chamber established an entity to run the centre. They were anxious that the tourist/visitor centre would open in March as it is a good facility for town tourism. The tourist/visitor centre normally opened in March. As a result of the tender, the Chamber operated the centre until September and the company awarded the tender took over at this stage. At this time the County Council did not employ any staff within the tourist/visitor centre.

TM explained that since January 2009, approximately 80 staff had left the County Council due to non-renewal of fixed term contracts, incentivised early retirement schemes and redundancy situations.

Cross Examination

During cross examination the witness, TM, confirmed that when the County Council decided to cease operating the centre they were advised that closing the tourist/visitor centre resulted in a redundancy situation. When questioned about a Transfer of Undertakings, TM informed the Tribunal that the advice received by the County Council was that because the centre was closing no transfer existed.

TM confirmed that the Chamber used a Limited Company to operate the tourist/visitor centre from 1st April 2009. However, on 29th January 2009, when the decision was taken for the County Council to close the centre, there was no entity in place and therefore a redundancy situation existed. When questioned about the directors of the limited company, TM told the Tribunal that he was not party to any negotiations in respect of any legal entity created to run the tourist/visitor centre after the 30th January 2009.

TM did not agree that one of the options put to the claimant was to take a pay cut of 26% because if the tourist/visitor centre broke even the bonus due to him would keep his wages at the same level. TM went on to explain that in all correspondence with the claimant it was made clear that the operation of the tourist/visitor centre would be under review.

TM confirmed that at the time of the closure of the tourist/visitor centre the County Council thought that the claimant was employed on a fixed term contract. This was for a fixed period to run the tourist/visitor centre. He said the County Council did not seek to make the claimant redundant, the position became redundant when the county manager decided to put the tourist/visitor centre out to tender.

The Tribunal sought clarification from TM about the approximate 80 staff that had left the County Council. TM confirmed that approximately 10 of these were due to redundancy situations which

arose naturally due to the closure of certain facilities.

Claimant's Case

During direct evidence the claimant, WK, told the Tribunal that JL came on board in the tourist/visitor centre in 2005 and the centre was quite new to him. At the end of the season in 2005 the claimant sat down with JL and explained what he thought the tourist/visitor centre needed to operate successfully. WK suggested that the County Council take back in the café and move it near to the door to gain passing trade off the street. The claimant said it was agreed with himself, JL and the County Council that these changes should happen to take the tourist/visitor centre to a corporate level. In 2007 the tourist/visitor centre got a new catering system.

The claimant explained that all capital expenditure was carried out on approval by JL. The claimant told the Tribunal that the understanding and thinking was that in 2009 and 2010 the tourist/visitor centre would reap the benefits of the money that had been spent on it.

The claimant told the Tribunal that at the end of every season he would give JL a report on how the season went. At the end of 2008 this was the same except the economic downturn had to be taken into consideration. The claimant proposed that all roles of staff within the tourist/visitor centre be amalgamated therefore reducing the number of staff required. The claimant told the Tribunal that on 23rd January he arrived at JL's office with the report in a brown envelope. After leaving the office he felt he needed a record of delivery so he also emailed the report to JL.

The claimant outlined a brief sequence of events:

On 13th January 2009 JL asked the claimant for a report for the next day. The claimant told JL that he would need longer to complete the report. JL said that he would extend time until 15th January and on that day the claimant gave him the report. On the 19th January 2009 the claimant asked JL for feedback on his report. JL told the claimant that he would come to him on the 20th January 2009.

The claimant told the Tribunal that on 20th January 2009 JL presented him with two options. One option was that the tourist/visitor centre would close and the claimant would lose his job. The second option was to take a salary reduction. The claimant said that a reduction in salary was also a demotion because he would no longer be manager of the tourist/visitor centre. He would be a facilities manager reporting to a Grade 7 employee.

At the end of the meeting on 20th January 2009 the claimant went back through what had been discussed and asked JL to confirm the options. The claimant then sent an email requesting the options in writing for clarity.

The claimant told the Tribunal that the date on his letter of dismissal was 23rd January 2009 but he did not receive this letter until 27th January 2009. The claimant felt that the report he submitted on 23rd January 2009 could not have been taken seriously if his letter of dismissal was dated the same day.

On 27th January 2009 the claimant was approached by JL who asked him if he had received that day's post. The claimant said he had not and questioned JL as to why. JL informed the claimant that a letter had gone out to him about his dismissal. They then talked about the claimant taking over the tourist/visitor centre as a limited company. The claimant explained to JL that he was not in a position to pursue that option because he had bought a house the previous year.

On 27th January 2009 the claimant requested his personnel file and saw the letter of dismissal. When he got home the letter had arrived. The claimant told the Tribunal that the envelope containing the letter was dated 26th January 2009.

On 30th January 2009 the claimant received a phone call from TM informing him that he had a letter for him. He arranged with TM to leave the letter in the library for him to collect. The claimant told the Tribunal that the letter of 30th January 2009 spoke about a report and informed him that he was being made redundant.

The claimant told the Tribunal that creating a limited company to operate the visitors centre was a viable option because it would have removed obstacles such as shift allowances and pay scales which were costly for night work and corporate events.

Cross Examination

During cross examination the claimant agreed that he was familiar with the financial situation within the tourist/visitor centre. The claimant accepted that there was a situation where income was not meeting expenditure. He further agreed that in 2008 JL discussed the future of the tourist/visitor centre with him as they do every season.

The claimant told the Tribunal that he was not aware of the possibility that the tourist/visitor centre was going to shut down until 20th January 2009. The claimant told the Tribunal that a pay reduction was not an option for him because in his opinion it would result in a demotion to facilities manager and he would be reporting to a colleague of the same grade.

The claimant did not accept that the post of Manager in the tourist/visitor centre was gone. He accepted that the County Council were no longer operating the tourist/visitor centre but that the position of manager was still there. The claimant agreed that there had been no vacancies filled in the County Council since he left.

The claimant told the Tribunal that when JL came on board they sat down and agreed that money had to be injected into the tourist/visitor centre to explore other options. The claimant said that the reports he submitted showed that the tourist/visitor centre was on track to break even in 2009 and for this reason the decision to cease operating the tourist/visitor centre came as a surprise to him.

Determination:

The claimant remained on in the tourist/visitor centre until January 2009. The Tribunal is satisfied, based on the respondent's evidence that the centre was incurring serious losses and that it could not be sustained particularly in light of the current economic situation. The Tribunal is also satisfied that the respondent's decision to close the centre was made purely on economic grounds and that the re-opening of the centre by a third party was done so independently of the respondent. The respondent argued that the claimant was employed for a specific purpose, to run the centre, and once the centre closed his position became redundant.

The Tribunal, based on all the evidence adduced before it together with the documentation and arguments put forward by both the claimant and the respondent find that a genuine redundancy situation existed. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed. The Tribunal finds that the appellant is entitled to a redundancy payment based on the

following information:

Date of Birth:	13 th July, 1978
Date of commencement of employment:	05th March 2005
Date of termination of employment:	31st January 2009
Gross weekly pay:	€1,043.35

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Please note that there is a weekly ceiling of €600.00 on all awards made from the Social Insurance Fund.

The Tribunal finds that he is entitled to an award of €2,086.70 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

No evidence was produced to support the claim under the Organisation of Working Time Act 1997 and accordingly the said claim fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)