EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD1131/2009

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B L

Members: Mr. L. Tobin
Mr A. Butler

heard this claim at Wicklow on 16th April and 11th May 2010

Representation:

Claimant : Ms Audrey Coen B L instructed by
Augustus Cullen Law, Solicitors, 7 Wentworth Place, Wicklow

Respondent : Ms Muireann McEnery
Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

Since dismissal was in dispute in this case it fell to the claimant to present his case first.

Claimant's Case

When the claimant commenced employment as a security officer with the respondent in March 2002 he was less than four months shy of his sixty-first birthday. His initial statement of employment contained several sections including one on pensions. That section stated that the company did not operate a pension scheme. However, in subsequent such statements issued to the claimant the pensions section contained the information that employees could avail of a personal retirement savings account (PRSA) facilitated by the company. Under that section the retirement age was, in the first instance sixty-five, then changed to sixty-six in later statements. Four of the five statements received and signed by the claimant contained an age for retirement. He told the Tribunal that he regarded such a change in those statements as a unilateral act on the respondent's part. Besides such significant changes were not directly brought to his attention and as such he regarded his initial contract as the one that mattered to his circumstances.

The claimant felt there was "no real difficulties" with the respondent between 2002 and 2007 apart

from a couple of reprimands. In September 2003 he appealed a verbal warning and in early 2008 he was issued with a written warning but on appeal that was reduced to a verbal warning. In 2005 the claimant was both praised and awarded by a client company for his role in addressing a security incident on site. While appealing his written warning the claimant was assured by a director of the respondent that his employment was safe and secure with the company well into the future. That assurance followed the completion of a certificate of income form by the respondent for the claimant in his application for a fifteen-year home loan. That form did not contain the claimant's date of birth. However, the claimant said that his date of birth was known to the respondent. He had certainly supplied that information to the company secretary when applying to change his PRSI status when he was approaching his sixty-sixtieth birthday.

In accordance with relevant legislation the claimant secured the necessary licence in early 2008 to continue to work as a security guard beyond the age of sixty-five. The respondent was aware of that development. Around that time his hours of work were being reduced and in resisting that move the claimant applied to the Labour Relations Commission on that issue. In March of that year he sustained injury during the course of his employment and required medical treatment. The witness insisted he did not miss work due to that mishap and was very critical of the respondent in asserting otherwise. He was shocked at the contents of a letter written by the director in response to this accident and its aftermath. He interpreted its contents that the company wanted to dismiss him. A further surprise came in the next letter dated 24 April 2008 when the director indicted that it had just come to his attention that the claimant was now sixty-six. The witness found this comment "strange" considering he had submitted his date of birth to his employer on a number of occasions. He replied to the director reminding him that no obligation existed for him to retire at sixty-five and that he had his licence and the respondent's consent to continue working.

The subsequent retirement meetings cumulated in a letter dated 29 July 2008 from the director to the claimant. That letter read as follows:

Please be advised that the company's retirement age of 66 is mandatory. We are committed to the welfare and safety of all employees and their families.

The retirement age of 66 is set for you to enjoy this time with your family and friends.

As a gesture of goodwill you don't' have to complete your roster and I am paying you your contractual notice of four weeks in lieu of your work. Your final day of employment will be 26th August 2008. Your P45 and monies due will be forwarded to you.

We would like to thank you for your services to X (name of company*) and wish you well in your retirement.*

The claimant regarded this as a letter of dismissal and approached his legal representatives on this issue. He had earlier received another letter from the respondent that angered, worried and upset him as it strongly suggested that company was about to dispense with his services.

As a result of a retirement appeal hearing on 20 August 2008 the claimant received a letter from the respondent in which it accepted some shortcomings in its approach to his case. However, the company having "looked into the matter" requested the claimant to attend a medical examination to ascertain his level of fitness for any duties that might be assigned to him in the future. The respondent would continue to pay him pending the outcome of that medical. It then hoped to offer him a fixed term contract. That medical examination took place on 8 October and a week later the

claimant received a letter from the director stating that that examination indicated he was fit for work. The work offered, however, consisted of an eleven-month contract and a minimum of fifteen hours per week. That letter continued with the following:

We are also requesting that all claims lodged with the Labour Relations Commission are withdrawn and that this can be confirmed in writing.

The claimant felt bullied into accepting that contract which was due to commence on 20 October. It was his intention to continue working based on his original contract that provided for at least forty hours per week.

The witness did not report for work on 20 October 2008 as he and his legal representative continued to challenge this change in the terms and conditions of his employment. He was now "in no man's land" where his situation was neither "fish nor fowl". The witness could not make "head nor tail" of some of the contents of a letter, dated 12 November he read from the director. In justifying offering the claimant fifteen hours a week that director stated that there had been numerous complaints about him from clients who did not want the claimant on their premises. The claimant told the Tribunal that apart from previously mentioned instances he was not made aware of other complaints. The witness also found the last two points on that letter as inaccurate, insulting, intimidating and bullying. Through his solicitors he declined to accept the fixed term contract on offer. By early December 2008 the respondent suspended the claimant's pay, as "he has provided no good reason for not attending work".

On 9 December 2008 the claimant penned a hand written letter directly to the director expressing his shock and astonishment at the suspension of his pay. The letter writer then requested that a formal grievance procedure be initiated into that suspension. He was not really surprised at the lack of a response to that letter. The hearing at the Labour Relations Commission was adjourned in January 2009 and it was clear to the claimant by then that the respondent was not prepared to reinstate him on his original contract of employment. Having considered and discussed his situation with his legal team the claimant submitted a letter to the director, dated 28 January 2009 in which he stated he could not accept such a fundamental change in his terms and conditions of employment. That letter concluded with the words: *By reason of same I have no option but to treat myself as having being dismissed……..* The claimant subsequently submitted a T1-A to the secretariat of the Tribunal.

Respondent's Case

The director established this business in 1986 as a sole enterprise concern. That situation and status changed three years later when he started to employ staff to fulfil secured contracts. He had no background in human resource matters as one of his daughters attended to that aspect of the business. When that daughter died tragically in May 2007 the respondent was in many respects left "rudderless" and management issues went "down the tubes". However the director was aware of new legislation governing the security business introduced in the mid 2000s. He told the Tribunal that it was his belief he could not directly ask the age of the respondent's employees, as this was contrary to current legislation. He was adamant that he did not know the claimant's date of birth until the issue of an accident report emerged in the spring of 2008.

While he had respect for the claimant, the witness commented that client relations were "not a big thing for him". A number of clients complained of the claimant's style and behaviour at work. However, the witness did not believe in the "hatchet" approach to management issues, as he

preferred to adopt a "man-management" manner. By the autumn of 2007 an outside agency became involved in advising and guiding the respondent on employment issues.

In accepting there was faults in the respondent's retirement policy as for example that employees were not explicitly made aware of a changes in the retirement conditions brought about by the introduction of PRSAs the witness understood that contracts were issued to employees on the knowledge that they were read and understood by them including the claimant. He described as an off the cuff remark he made to the claimant in late 2007/early 2008 when it was reported that he said he was happy to continue to employ the claimant into the future. Besides at that stage he did not know the claimant's age and was not aware of an earlier contact between him and an administer regarding his age and PRSI contributions.

The witness referred to I. S. 999 of 2004, among other things, in altering the claimant's terms and conditions of employment. Those other things were that the respondent had very limited scope to offer the claimant full time work due to a downturn in business and that since several clients had expressed a view that they did not want him on their premises the respondent was further restricted as to the type, duration and amount of work it could provide to him. In a letter dated 12 November 2008 the witness told the claimant's representative that he had been advised that he was within his rights to put him on a fixed term contract. He also stated that the claimant had been given ample time to seek legal advice and that there was no reason why he could not return to work. The director accused the claimant of time wasting and of apparently having no interest in returning to work.

The director said that the respondent's offer of a fixed term contract to the claimant was a compromise solution in allowing the claimant return to work in order to "top up his income".

Determination

Evidence was adduced that the claimant began his employment with the respondent company in March 2002. He was given and signed a contract of employment shortly after commencing his employment. There was no mandatory retirement age in his original contract. The claimant was thesubject of a few minor disciplinary matters during the course of his employment but the Tribunal issatisfied that these were not relevant to the matter in issue. The claimant's original contract was renewed in 2004 and 2007. The respondent stated that the company did have a retirement age butno retirement policy. The retirement age was originally 65 but that was increased to 66 due to thefact that the pension could not be drawn down until the age of 66. The mandatory retirement ageclause in the contract of 2004 and 2007, which was not present in the 2002 contract, was situated inthe pension section of the contract. There was no pension clause in the 2002 contract. The respondent did not have a pension scheme at that juncture. The inclusion of a pension clause and amandatory retirement age was not specifically drawn to the claimant's attention despite the contractof employment specifically stating that it would " *give not less than two weeks written notice tosignificant changes*". The claimant stated that he was unaware of the mandatory retirement age andthought that the only changes in the contract were to do with his remuneration. The respondent gave evidence that it was obliged to adhere to IS 999/2004 under which they were obliged to haveall employees who had reached retirement age medically assessed to ensure they were medically fitto carry out their duties. The claimant was assessed in March, April and October 2008 and was certified fit to work. The company conceded that the first time it addressed the retirement age issuewas when this issue with the claimant arose. They conceded that it was their preference that he didretire due to difficulties with his employment.

It is clear from the evidence that no mandatory retirement age existed in the company. One other employee remained on in his employment for four years after his 65th birthday and only retired after failing the IS 999/2004 medical. The Tribunal notes that this employee was offered a fixed term contract upon reaching the age of 65 and remained in his employment on a fixed term contract until he retired.

The claimant's employment was terminated by letter on the 29th July 2008. The claimant appealed that decision and following that appeal he was reinstated conditional upon him passing the IS 999/2004 medical and upon him entering into an eleven month fixed term contract with reduced hours and reduced pay, the effect of which was to seriously diminish the claimant's legal rights.

The claimant is alleging he was constructively dismissed from his employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

" *the termination by the employee of his contract of employment with this employer whether prior notice of the termination was or was not given to the employer in the circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer"*

The burden of proof, which is a very high one, lies with the claimant. He must show that his resignation was not voluntary. The legal test to be applied is "an and or test". Firstly, the Tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the Tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to termination the contract was a reasonable one.

The Tribunal is satisfied that the respondent's attempts to reduce the claimant's contract to a fixed term contract after six years of continuous service together with their stipulation that he could not continue on in his employment unless he entered into the fixed term contract was a significant breach going to the root of the contract.

The Tribunal find in favour of the claimant and awards him the sum of € 25,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)