

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD1371/2009

- Claimant W

against

EMPLOYER

- Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr J. Goulding
Mr P. Trehy

heard this claim at Dublin on 22nd June 2010

Representation:

Claimant(s) : In Person

Respondent(s) : Ms. Ruth Moylotte BL instructed by:
Mr. Brian Morgan, Morgan McManus, Solicitors, Law Chambers, The Diamond,
Clones, Co. Monaghan

The determination of the Tribunal was as follows:-

This case was held in conjunction with another claim (Ref: K37157 / UD 1395/ 2009) under the Unfair Dismissals Acts, 1977 to 2007 as it involves the same respondent but different claimant (Claimant J). Each claimant represented themselves (hereafter known as Claimant W and Claimant J) and cross-examined the respondents' witnesses in turn.

Respondent's Case:

The Human Resources Director (hereafter known as HR) and director of the Board of Directors of the respondent company gave evidence. The respondent was involved in transport goods for customers around the country. They employed staff as office staff, drivers and warehouse operatives. Sub-contractors were also hired, supplying their own vans and insurance, to make deliveries and collections and in turn invoiced the respondent for their services. The respondent had depots all over Ireland and England.

Claimant W was employed as a driver and Claimant J was employed as a warehouse operative from the Dublin depot.

She explained that the work involved in the respondent's business was labour intensive. Trucks

were loaded and unloaded with goods. Employee drivers had bulk runs, which meant they could be on the road for a long day. Sub-contractors did more runs but were for smaller areas.

Prior to 2007 it was custom and practice for employees to retire at 65 years of age. In 2007 laws were changed in England and in turn a Retirement Policy was introduced for all employees, including Ireland. The witness stated that all employees were aware of this but it was not specifically highlighted to staff until nearer their retirement. The policy was displayed, with all other policies, for all staff to read in each depot. She also explained that the insurance policy for all drivers had been renegotiated and was an open plan option covering employees with a full driving licence between the ages of 21 years and 65 years of age. Previously the policy only covered employees between the ages of 25 years and 63 years of age.

All employees' details were logged on a computer system. In late 2008 a "glitch" occurred and a large number of the 400+ employees' details were altered giving them the same start date and an age of 45 years. All the files and details were checked, verified and corrected. 2 or 3 employees were found to have reached the age of 65 years of age and retirement was discussed with them. The staff were surprised they had not been spoken to previously. The witness again stated that the drivers especially had to be retired at 65 years, as they were not covered by the respondent's insurance policy. The insurance policy excluded this. She spoke to the insurance company but they were unwilling to amend the policy mid year.

At this same time the whole company was going through a restructuring process. A third of employees were let go in the Dublin area. She explained that in exceptional circumstances staff had stayed on beyond their 65th birthday. One in particular had remained as a warehouse operative and had been recommended by the respondent's biggest client to keep him on to deal with one particular customer. He was also in great physical health. Another had been a driver and had stopped driving but became an operative and key holder in a small depot near where he lived. He also had worked shift hours, which would not have been viable in the busy Dublin depot.

In respect of the Claimant J she stated that he had requested at an earlier time to be given lighter duties.

On cross-examination by the Claimant J she stated she had been made aware he had been spoken to twice before he was made retired. He had never communicated to management that he had wanted to remain working for another few years. When put to her that he was very capable of carrying out his duties and had been carrying out the same duties for some time she replied that, as far she knew he was not carrying out normal duties.

On cross-examination by the Claimant W she stated that the retirement policy was posted on the notice boards in the depots. When put to her that the respondent had a copy of his driving licence on record, therefore knew his age and why they had to wait till after his 65th birthday to tell him he was to retire she responded that there had been a "glitch" in the computer system and it took time to go through all 400 employees records manually to discover the information. She did state that Claimant W did request to stay on for another few months but not "through another winter".

When asked by the Tribunal she said that they did not have written confirmation both claimants had read the retirement policy. When asked if there were any other duties the claimants could carry out instead of being retired she replied that staff numbers had been reduced due to the restructuring. However Claimant W had been offered to become a sub contractor for the respondent but he had declined the offer. When asked she stated that driving insurance policy had not been a factor under which Claimant J had been retired, it was company policy.

She again stated that under exceptional circumstances 2 employees had been kept on after their 65th birthday. They had taken into account what both claimants had said concerning staying on beyond

their 65th birthday but the Board of Directors found there were no exceptional circumstances. When asked if the age barrier had been discussed with the claimants when hired she stated it was not something that would have been discussed at interview level.

The Tribunal highlighted to the witness the unimaginable consequences which could have happen with the fact that it had transpired a few employees remained working for the respondent company even though they were not covered by the open option 21 years to 65 years of age insurance policy.

The Dublin Depot Manager (hereafter known as MC) gave evidence. He had met with both claimants in respect of their retirement.

In respect of Claimant J he had met with him on February 7th 2009 in the Area Managers office. He read out minutes of the meeting to the Tribunal. Claimant J had been surprised about the retirement and asked if he would be made redundant. He was very upset. At the next meeting on February 19th Claimant J was very agitated. Claimant J's Line Manager was also present. When asked he said that he was aware of company policy for employees to retire at 65 years of age. He also stated that Claimant J had been carrying out lighter duties than other warehouse operatives.

In respect of Claimant W he stated he had met him on 3 occasions. He assumed that Claimant W was aware of the respondents' retirement policy. Claimant W felt he could work on and the witness suggested he become a sub contractor for the company but the Claimant W did not want to go down that route. The witness stated that he had become aware later that a few employees had remained working after their 65th birthday.

On cross-examination by Claimant J he stated he had had a meeting with him on February 7th even though Claimant J denied they had. When asked he said that February 7th had been a Wednesday. Although the witness worked Monday to Friday he said he would attend meetings at the weekend if needed. When put to him he said he did deny the claimant in question was a good worker. He was not aware that the claimant had wanted to remain working beyond his 65th birthday because he was financially supporting his children and grandchildren that had been affected by the his children's' loss of employment.

On cross-examination by Claimant W he stated he had not known why the claimant in question had wanted to remain on in work beyond his 65th birthday and was shocked to hear it was because of a daughters illness that had resulted in her very unfortunate demise 2 weeks before the date of the hearing.

The Area Manager gave evidence. It was put to him the details in Claimant J's T1A that he had been approached by Claimant J some time previously looking for information concerning retirement and the fact that he would look into it. The witness said that he had no recollection of it and had no direct interaction with employees.

He also did not recall a conversation with Claimant W concerning a conversation about 2 other employees working beyond their 65th birthday.

Claimant's Cases:

Claimant W:

He stated that he had his own company delivering and collecting parcels in the past. Due to financial constraints beyond his control he lost his business. However a former employee who was then the Depot Manager of the respondent company heard of his situation and he was offered a position with the respondent company as a driver. He was given a run in the Kildare area working 5.30 am to 6 or 7 pm.

One week after his 65th birthday he was called to a meeting with MC. He was informed they did not want him to go and suggested he become a sub contractor. The claimant explained that due to his family situation it was impossible to consider the option. MC also told him that he would make a representation for him to the Board of Directors for him to remain working. On March 13th 2009 he was told he was retired. He brought up the subject of 2 other employees still working beyond their 65th birthday and was told by the Area Manager they would not be there much longer.

He told the Tribunal that he had been offered another position with another company in late 2008 and had not taken it up, as he was happy working for the respondent. He said he would have reconsidered if he had known he would be made retired 3 months later.

In March 2009 he contacted the respondent's insurance company and was told there was no age limit for drivers on their policy with the respondent. There was no redundancy package offered to him. He gave evidence of loss.

On cross-examination he stated that one of the other drivers employed by the respondent was over 65 years of age. He stated he had never seen the minutes of any meetings before the day of the hearing. He was not aware of any other drivers who had been made retired. He had never approached the Human Resources department to discuss retirement.

Claimant J:

The claimant stated he had worked on the construction of the respondent's building and the then Depot Manager had asked if he wanted to remain working for the company. He had worked long hours, often late on his own and had not been paid overtime. He had originally worked on a contract for a particular customer but when this ceased it had spent his morning working on the forklift and the afternoon on "returned" goods.

In early 2008 he had spoken to the Area Manager about retirement as he had personal difficulties, which meant he would have remain working beyond 65. The Area Manager said he would look into it but never got back to him. In July 2008 he discussed the matter with his Line Manager who said he would look into it. His Line Manager informed him that he would receive a letter nearer to the time to say if he could stay on or if he would have to retire. He heard nothing about his retirement until February 19th 2009 and had not been previously aware of the company's retirement policy. He gave evidence of loss.

On cross-examination he again stated he had not met MC on February 7th 2009. He told the Tribunal that he had been made aware a driver employee in Limerick had been still employed at the age of 67. He said that he had expected to remain working for the respondent for a number of years.

When asked by the Tribunal he stated that he had worked for the respondent from Tuesday to Saturday.

Determination:

The Tribunal having heard all of the evidence are satisfied that there was no retirement clause in the claimant's terms and conditions of employment. The respondent stated that it was custom and practice within the company and that there was a policy document on the issue filed in each of the warehouses. This document was not produced at the hearing nor was it ever given to the claimant. The claimant was not aware there was a retirement policy. Furthermore the company produced its open drive option insurance policy which they alleged did not permit anyone to drive beyond their 65th birthday.

The respondent conceded that there were two other employees employed who worked beyond their 65th birthdays. It transpired after much probing that there was a third employee in Limerick who also worked beyond his 65th birthday. The respondent stated that each of these employees had a specific purpose within the company and for that reason they felt they came under the exception clause.

Evidence was adduced by MC in relation to a computer programming fault with the respondent's personnel files wherein the system altered the ages of several employees from their true age to 45. This was not discovered until late 2008 and it took until Mid February 2009 to discover the fault in relation to the claimant. Conflicting evidence was given by MC on behalf of the respondent when asked by the tribunal why the claimant was not considered for the redundancy programme they were embarking on in February, 2009. He stated the reasons were two fold. Firstly, the claimant had an excellent employment record and he was an excellent driver. He went as far as stating that he was one of the best the company had. He stated that because he had an unblemished record he would not have been selected even if he had been subjected to the selection test. Secondly, because he was due to retire. If the respondent's earlier evidence is to be believed, the respondent could not have been aware that the claimant was due to retire because his age on his personnel file was 45 and that was not rectified until mid February, 2009.

MC who was the respondent company depot general manager for the last four years stated that the outset that he was fully aware of the respondent's retirement policy and that a copy of it was filed in every depot. He was also fully familiar with the insurance policy allegedly only covering drivers from 21 years to 65 years.

MC requested a meeting with the claimant on 19th February, 2009 to discuss his retirement date. At that meeting the claimant requested that he be kept on in his employment because he had a terminally ill daughter and he needed to be in a position to support her and pay for her treatment. MC stated to the claimant that he would make enquires to see if it was possible. On the 19 February, 2009 the claimant was 65 and eight days and no longer covered by the respondent's motor insurance. MC knowingly permitted the claimant to drive the respondent's lorry without insurance for a period of four weeks. Furthermore the Tribunal notes that there were several other employees who were permitted to drive for a period of time without insurance. The respondent's defence was that they didn't know due to the computer fault. That may be the case for other employees, albeit not acceptable, but it was not the case with the claimant. MC knew he was over 65 and as he stated himself, was very familiar with the insurance policy and even then permitted the claimant to drive uninsured. This is a most serious breach of the law of which tribunal takes a very dim view. Furthermore the tribunal takes an equally dim view of MC's flippant attitude when questioned by the Vice Chair about the issue. Simply stating that he did not know or that it didn't cross his mind is not acceptable to the tribunal nor is it an acceptable excuse or defence in law. It is only through sheer luck that an incident didn't occur or that it was brought to the attention on An Garda Siochana.

MC met with the claimant again on the 10th March 2009. He suggested that the claimant could remain on with the company as a subcontractor. That meant that he would have had to buy his own delivery van. The claimant turned down this offer as it was not something he was in a financial position to do. The claimant was formally retired on the 13th March, 2009.

Evidence was adduced and an e-mail dated 17 June, 2010 was put into evidence stating that “*the open drive option would not be able to be changed until renewal and there would be an increase in premium*” The renewal date was September of each year. The respondent's evidence was that the insurance company would not allow anyone over the age of 65 to drive commercial vehicles. Based on the e-mail submitted this is not the case. There is an option to extend the age limit however it is noted that it would be subject to an increase in premium. No evidence was

given as to what the increase was likely to be. No evidence was adduced that any attempts were made in September, 2008 to extend the policy to cover those over 65. No evidence was adduced as to what other insurance options were open to the respondent. The tribunal also notes that there is a section in the policy for named driver(s) that was left blank.

Based on all of the evidence adduced the tribunal is not satisfied that the company had a retirement policy or even a comprehensive custom and practice in relation to retirement. The claimant's terms and conditions of employment were silent on the issue, no staff handbook existed and if a policy document did exist it was not put in evidence nor was it ever given to the claimant. No notice was given to the claimant either, before, on or directly after his 65th birthday. The Tribunal is not satisfied that the respondent's insurance policy was as restrictive as was alleged to be.

The Tribunal find that the claimant was unfairly dismissed and accordingly award him the sum of € 33,500.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)