EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE - *claimant*

UD891/2009,
MN924/2009

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr T. Gill
Mr O. Nulty

heard this claim at Sligo on 23rd February and 22nd April 2010

Representation:

Claimant: Ms Cliona Kimber BL instructed by
O'Boyle, Solicitors, Courtyard, The Mall, Sligo

Respondent: Mr Loughlin Deegan, IBEC, 84/86 Lower Baggot Street, Dublin 2

Preliminary Point

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn at the outset of this hearing.

Respondent's Case

The respondent has a presence in up to forty locations in the west and northwest of the country employing hundreds of people. Its activities are divided into several divisions that included a consumer food section based in Sligo town where the claimant worked. This group's human resource manager who started there in early 2005 told the Tribunal that he understood that the normal retiring age of employees with this company was sixty-five. This was the age in which they were required to cease their employment.

That understanding was based mainly on three factors. These were custom and practice within the group, agreement with the trade unions, and the terms and conditions of a widely used pension

scheme. This witness also referred to an unwritten arrangement whereby a percentage decreasing ex-gratia payment was applied to employees leaving the company by way of redundancy when they reached their sixtieth birthdays and up to their sixty-fifth year. The witness stated that the bulk of employees left at the normal retiring age but there had been some exceptions to this for various reasons when some had continued in employment with the consent of the respondent beyond that age. The human resource manager while insisting there was an agreement with the trade unions on this issue said that there was no written documentation to support that contention. The pension scheme to which the claimant belonged clearly stated that its compulsory retiring age was sixty-five.

The witness agreed that the claimant's written contract of employment did not contain a retiring age. That contract was dated 6 March 1984 and was issued to her when she commenced on a temporary basis. It expired on 1 June 1984 and no subsequent contracts issued to her when she continued on in her employment up to November 2008. The witness referred to correspondence he had with the claimant. He handed her a letter dated 10 March 2008 from the pension scheme that among other things stated that the normal retiring age for her was sixty-five. He was also the author of a letter to her dated 19 September 2008 confirming she was to retire on 27 November 2008, which was her birthday.

A number of meetings were held with the claimant concerning her upcoming retirement and pension arrangements and at no stage did she question or challenge the respondent on their plans to terminate her employment. The witness acknowledged he received a letter from the claimant's solicitor dated 19 September 2008. That letter stated that the claimant was "a stranger" to an alleged company policy that retirement within the company was sixty-five. That solicitor also wrote to the company's legal representatives on 22 October and highlighted that their client would not be voluntarily retiring on her sixty-fifth birthday. The respondent issued the claimant with her P45 stating her date of cessation was 26 November 2008. The witness said that this was not a redundancy situation and that the claimant had never been offered redundancy.

The general manager of the respondent's consumer food division told the Tribunal that no employee working in that division had remained in employment beyond the age of sixty-five. Twoemployees had requested that they remain in employment beyond the age of sixty-five but their requests were not granted and they retired on their 65th birthdays. The company held discussionswith employees including the claimant in 2006 in relation to a modernization process which wouldhave resulted in the claimant, along with other employees moving their place of work toTubbercurry. The claimant indicated at that point that she would not be interested in moving toTubbercurry and would be willing to accept a redundancy package if it was on offer. The proposedmove to Tubbercurry ultimately never occurred and no offer of redundancy was made to theclaimant.

The witness spoke with the claimant on a regular basis and the claimant never expressed any surprise at the fact that she was due to retire in November 2008 upon reaching her 65th birthday. A number of meetings took place in the months leading up to her retirement and following one such meeting the claimant stated that she wished to accept redundancy. When the witness informed her that there was no redundancy situation the claimant enquired as to who made the rule concerning a compulsory retiring age of sixty-five. The witness informed her that the Chief Executive Officer of the organisation made that rule. The witness gave further evidence that she never invited the claimant to accept voluntary redundancy as there was no question of voluntary redundancy being offered. The claimant was replaced following her retirement and her duties are still carried out in the Sligo office.

Under cross examination the witness confirmed that she could not provide the Tribunal with any contractual documentation stating that the claimant's retiring age was sixty-five. There was nothing on the claimant's personnel file stating that she must retire at sixty-five. She denied that the claimant was ever offered redundancy. She agreed that if the claimant's place of work had moved to Tubbercurry consideration would have been given to the offer of redundancy but the move never occurred. She agreed that in that context the possibility of redundancy was discussed with the claimant and other employees.

The next witness gave evidence that he joined the respondent organisation in the 1970's and assumed a human resources responsibility in the mid 1980's. He was chairman of the trustees of the organisation's pension scheme and held that role in the 1980's and 1990's. The pension scheme provided for a retiring age of sixty-five and this provision never changed at any stage. Only a very small number of exceptions were ever made to this retiring age and 99% of employees retired at sixty-five. He never recalled the employees' trade union organisation ever disputing the compulsory retiring age of sixty-five.

Under cross examination he confirmed that he could not provide the Tribunal with any contractual documentation that stipulates a compulsory retiring age of sixty-five. He confirmed that the pension scheme applied to all employees irrespective of whether they held trade union membership. He confirmed that hundreds of employees retired on reaching the age of sixty-five. He could only recall 3 employees who remained in employment beyond the age of sixty-five but accepted that there could have been a further small number. Employees who worked beyond the age of sixty-five retired in the normal way but because of their specialist skills were re-engaged on new temporary or part-time contracts of employment.

Claimant's Case

The claimant gave direct evidence that she worked for the respondent organisation for over 24 years. Her final net salary per week was €450.00. She worked in the accounts department and her responsibilities included bank reconciliation, invoicing and purchasing. She was never provided with any written documentation stipulating a compulsory retiring age. She did not believe acompulsory retiring age existed in the organisation. She recalled at least 3 employees who over theyears worked for the organisation beyond the age of sixty-five and these employees were employedas general operatives.

In the summer of 2007 her employer informed her that her workplace was going to be moved to a different location. The general manager asked if she would be interested in voluntary redundancy and she informed the general manager that she would be interested in accepting redundancy. She was then informed prior to Christmas 2007 that the redundancy situation would not apply for a few months. In February 2008 the general manager informed her that she was calculating redundancy figures and enquired as to her date of birth. The witness provided her date of birth and the general manager remarked that she (the witness) would then be due to retire in November 2008. The general manager then informed her that the respondent organisation would not make any employee redundant in their final year of work.

The witness attended a number of meetings in September and October 2008. She was told by the general manager that she would not be offered redundancy. The witness replied that she did not see any reason to terminate her employment if she was not receiving redundancy. She was then told that she would not be allowed to remain in employment beyond her 65th birthday. She was very

upset and felt badly treated by the respondent organisation. She was issued with a P45 on 27 November 2008 and that was the end of her employment. She has not been in paid employment since the termination of her employment in November 2008.

Under cross examination she confirmed that she joined the Irish Cooperative Society's (ICOS) pension scheme, which was offered to employees by the respondent, in 1986. She received bookletson the pension scheme periodically. She accepted that a clause relating to a pension age ofsixty-five is included in those booklets, but stated she saw it as an option, and it did not mean shehad to retire at that age. She received annual benefit statements from the pension scheme andsixty-five years of age is recorded as the normal pension age in the benefit statements. Sheconfirmed that she informed the general manager that she would be sixty-five in November 2008but never informed her that she would be retiring. She was offered redundancy in the summer of2007 by the general manager but was not provided with any documentation relating to the offer.She understood that she was leaving the organisation on the basis that she was being maderedundant.

The next witness told the Tribunal that she worked for the respondent organisation for 14 years. She worked in the accounts department. During her time working for the respondent she was not aware of the existence of a compulsory retiring age. She was aware of at least two employees who remained in employment beyond the age of sixty-five.

Determination

In this case the employer admits the dismissal of the claimant but relies on the provisions of section 2(1) (b) of the Unfair Dismissal Acts 1977 to 2007 (hereafter referred to as "The Act") which provides that an employee who on or before the date of dismissal has reached the normal retiring age for employees of the same employer in similar employment, may be excluded from claiming under the Act.
It therefore falls to the Tribunal to determine whether the said section applies to the dismissal, and if so whether the claimant had reached normal retiring age on or before the date of dismissal.
It was not contended that the claimant's dismissal was connected with Trade Union membership or activity; therefore it is open to the Tribunal to consider whether the claimant is excluded under the provisions of section 2(1) (b) of the Act.
It is common case that there is no reference to retiring age in any contract relating to the claimant. The only written reference to retirement is in the terms of the Irish Cooperative Society's (ICOS) pension scheme. This pension scheme to which the claimant belonged refers to a normal pension age of sixty-five, with a proviso for the employer to continue an employee in employment after that date "in exceptional circumstances". It is further accepted by both sides that a number of employees worked on after they turned sixty-five, though the respondent contends that these were in circumstances where the employees had a specialised skill, and they were engaged on temporary or part-time contracts only. In one only of the ICOS explanatory booklets submitted to the Tribunal there is a reference to compulsory retirement at age sixty-five being "normal pension age". The claimant confirmed she joined the pension scheme in 1986 and had received booklets regularly with the terms and conditions of the scheme shown. She admitted she had seen the provision for retiring and receiving her pension at age sixty-five in the booklets, but stated she understood that only to mean she would receive her pension at that age, but that she wouldn't be obliged to give up work. It was also contended that the pension scheme could not operate to alter any term of her existing contract with the respondent, and could not impose a retiring age on her where none existed in her contract.
The claimant submitted that in the absence of a written contract specifying a retiring age, the

burden of proof was on the respondent to prove what was the normal retiring age, and that the burden had not been discharged.

Despite the decision in Kiernan –v- Iarnrod Eireann (UD974/94), the Act does not require the normal retiring age to be shown by way of a written contract, or other written notification and therefore the evidence must be examined to see whether a normal retiring age has been established. As the claimant commenced employment in 1984, the absence of a written contract while regrettable is not unusual for that time. The claimant did not contend that she agreed or was offered some later or different retiring age when she took up employment, she states that no retiring age was ever mentioned or formed part of her contract.
What is important to decide is therefore what was the "normal retiring age" for "employees of the same employer in similar employment". The evidence of the respondent was that the vast majority of its employees retired at age sixty-five and there were only a handful of exceptions. The pension scheme which applied to the other employees of the respondent had a normal pension age of sixty-five apart from "exceptional circumstances", where the respondent at its discretion could optto continue the employee in employment past that age. The Manager of the division of the respondent where the claimant was employed gave evidence that no employee working in thatdivision had remained in employment beyond the age of sixty-five. Two employees had requestedthat they remain in employment beyond the age of sixty-five but their requests were not granted andthey retired on their 65th birthdays. While the claimant gave some examples of employees of therespondent who had in the past continued after age sixty-five, the Tribunal accepts that these wereunusual and the normal practise was retirement at age sixty-five.
Taking all these factors into account, the Tribunal finds that the normal retiring age for employees of the same employer in similar employment is sixty-five, and that as she had reached normal retiring age, on or before the date of her dismissal, that pursuant to section 2. (1) (b) of the Act the claimant is not a person to whom the Act applies, and her claim against the respondent is hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)