

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE

CASE NO.  
-Claimant UD1150/2009

against

EMPLOYER -Respondent

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr. J. Hennessy  
Mr. A. Butler

heard this claim at Abbeyleix on 14th July 2010

#### **Representation:**

Claimant: Ms. Miriam Hamilton, SIPTU, 3 Peppers Court, Portlaoise, Co. Laois

Respondent: Ms. Mary Quinn, Human Resource Specialist, H.S.E. Dublin  
Mid-Leinster, Arden Road, Tullamore, Co. Offaly

#### **The determination of the Tribunal was as follows:**

The claimant commenced her employment with the respondent on the 22<sup>nd</sup> December 2007 and her employment terminated on the 4<sup>th</sup> December 2008.

#### Preliminary Issue:

Representation for the respondent submitted that the claimant was assigned to the Catering Department from 22<sup>nd</sup> December 2007. The claimant provided locum/relief cover for a specific employee who was absent on maternity leave. The reason for the claimant's employment was made clear to her at the commencement of her employment and her contract of employment specified that her employment would terminate on 22<sup>nd</sup> June 2008.

The contract signed by the claimant for the period of 22<sup>nd</sup> December 2007 to 21<sup>st</sup> June 2008 was entitled "Contract of Employment for Relief Staff- If and When Required" and stated that the respondent,

*"....requires staff from time to time to fill vacancies on an "if and when required" basis. You have*

*indicated your availability for duty when the exigencies of the service so require e.g. to fill vacancies arising from sick leave, annual leave, etc. This contract relates to any such vacancies that may arise. You are not obliged to accept any offer of employment.”*

The employee returned from maternity leave on 15<sup>th</sup> June 2008 however at this time two chefs were transferred to another unit on a temporary basis and the shortfall in hours was offered to the claimant on a monthly basis. Again the Director of Nursing explained to the claimant that the transfers were a temporary arrangement and that when the chefs returned there would no longer be work available to the claimant. The transfer of the chefs reached an end in September 2008 and they returned to the respondent's premises. However, at that time another member of staff (Ms. G) was on sick leave and the claimant was offered monthly contracts to the claimant to cover Ms. G's sick leave.

The claimant was provided with renewals of her fixed term contract for the period of 22<sup>nd</sup> June 2008 to 21<sup>st</sup> September 2008, and a further renewal for the period of 22<sup>nd</sup> September 2008 to 31<sup>st</sup> October 2008. The claimant subsequently received a final contract to commence on 1<sup>st</sup> November 2008, which stated that the claimant was replacing a staff member who was on sick leave.

The claimant's employment was terminated because the purpose for which she was employed came to an end and no service need existed to justify the continuation of her employment. Therefore, as the claimant was employed on a fixed term/specified purpose contract she was not entitled to bring a claim under the Unfair Dismissals Acts, as the provision of S.2 (2)(b) applied.

Representation for the claimant submitted that the contract provided to the claimant was an "if and when contract without a specific name included of who the claimant was covering for. No contract was issued to the claimant between the 21<sup>st</sup> June and the 1<sup>st</sup> November 2008.

### **Determination on Preliminary Issue:**

S.2 (2)(b) states:

*This Act shall not apply in relation to-*

*Dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid.”*

This subsection must be read in conjunction with S.13 of the same Act, which provides,

*A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any Provision of this Act.*

There have been many cases where the Courts and the Tribunal have had to reconcile these two

provisions in the same Act, and the approach in established case law is to construe S.2 (2)(b) strictly.

The original contract signed by the parties did not specify maternity leave cover, or name the third party who was on that leave. The preamble to the agreement provided that the respondent,

*“...requires staff from time to time to fill vacancies on an “if and when required” basis. You have indicated your availability for duty when the exigencies of the service so require e.g. to fill vacancies arising from sick leave, annual leave, etc. This contract relates to any such vacancies that may arise. You are not obliged to accept any offer of employment.”*

This was the only reference to a “specified purpose” and in our view is too vague to comply with the terms of S.2 (2)(b). Moreover this contract did not include a provision excluding the Act under S.2 (2)(b).

Following the expiry of the maternity leave the claimant’s employment was extended to cover other relief work and not until the 31<sup>st</sup> October 2008 did she sign a contract in specific terms to fit, as contemplated by S.2 (2)(b). We doubt that S.2 (2)(b) would apply where someone was given such a contract well after their employment had begun.

Moreover the letter informing the claimant that her contract would not be renewed “due to current financial restraints.” Even if the respondent’s argument in relation to the contract stood the test, this letter is evidence that the dismissal did not consist “only” of “the cesser of the employment purpose” as required under the Subsection.

The Tribunal therefore ruled that the claimant was not excluded from the Act by virtue of S.2 (2)(b) and proceeded to hear the substantive issue.

#### Substantive Issue:

##### Claimant’s Case:

It was the claimant’s evidence that when she received the first contract for the period of 22<sup>nd</sup> December 2007 to 21<sup>st</sup> June 2008 she was told that she was employed to cover whatever hours were available. She stated that when her contract came to an end on 21<sup>st</sup> June 2008 she continued to work as normal.

The claimant described the first six months of her employment as “fine.” The Director of Nursing had informed the staff that the budget was going well and that there would be three monthly contracts. The Director of Nursing did tell the claimant that she could not guarantee her 39hours per week but she would give the claimant what hours she could.

In July 2008 the Director of Nursing held a meeting with the staff and informed them that she had to cut their hours. She said that she would spread the cut in hours equally between all of the temporary employees.

On the 22<sup>nd</sup> August 2008 the Director of Nursing informed the claimant that the temporary transfer of two chefs was coming to an end but that due to sick leave and annual leave, there would be plenty of work for the claimant.

The claimant informed the Director of Nursing that she was pregnant on the 8<sup>th</sup> September 2008. The Director congratulated the claimant but said she would not keep the claimant employed after Ms. G returned from sick leave.

The claimant was subsequently absent on sick leave but delivered a medical certificate to the Director of Nursing. The Director of Nursing was very caring towards her but told the claimant that she should start to look for alternative work and informed the claimant of where work was available. It was in or around this time that the claimant requested a contract. The Director of Nursing told the claimant that she had received a contract but that she would send for the renewal contracts.

The claimant suffered a miscarriage on 1<sup>st</sup> October 2008 and was absent from work until 8<sup>th</sup> October 2008. She subsequently received a second contract at the end of October 2008. The claimant thought it was strange that the Director of Nursing went through the contract in detail with her. The contract did not contain a date of termination but stated that the claimant was providing cover for sick leave. The claimant did not recall if she was informed that it was a one-month contract but she did not have any reason to think that her work was coming to an end.

In November 2008 the claimant was asked if she would like to utilise the Employee Assistance Scheme and she believed that management might have an issue with how she had coped with the miscarriage.

The claimant returned to work from annual leave on the 16<sup>th</sup> November 2008. On the 17<sup>th</sup> November 2008 the Nurse Manager provided the claimant with verbal notice stating the reasons for her dismissal were a lack of work and budgetary constraints. The claimant was provided with letter dated 14<sup>th</sup> November written by the Director of Nursing, who was then on annual leave.

The claimant stated at that time there were approximately six temporary employees and her position was the only one affected. The claimant felt that she was blamed for having a miscarriage as she had been using a moped to make her journey to work. The claimant expected that if there was a genuine cut in hours that it would have been divided up between the temporary staff, as had happened earlier in the year.

A Shop Steward gave evidence that he was not aware that a staff member was being let go due to budgetary constraints and he expected to be consulted if this was about to occur. Usually the hours are distributed equally between the temporary employees. He first became aware of the claimant's dismissal on the 18<sup>th</sup> November 2008, after notice had been given to the claimant. He wrote to the Director of Nursing on the 24<sup>th</sup> November 2008, requesting her to outline in writing why the claimant's employment was terminated. Her letter stated that she was not in a position to renew the claimant's contract due to budgetary constraints. The Shop Steward did not believe this to be the case as he was not provided with any evidence that the claimant was let go due to the budget and he added that the respondent always has a requirement for sick leave cover.

Respondent's Case:

The Director of Nursing gave evidence that the claimant was not dismissed by reason of her pregnancy. The claimant was treated the same as other temporary employees who were pregnant. A risk assessment of the claimant's work was carried out and her Line Manager was informed of her pregnancy.

From July 2008 the Director of Nursing was in a position where she could only offer monthly contracts to the temporary staff due to the recruitment embargo. At the meeting in July 2008 she had informed the temporary staff that the reduction in hours would be distributed equally between them. However, it was not possible to do this in November as the Director believed it would cause unrest among the staff and there were a number of employees who were entering their third year of employment with the respondent. At the time the claimant's contract was extended she explained to the claimant that all temporary contracts were being renewed on a month-to-month basis only.

The Director stated that she had regular discussions with the claimant where she informed the claimant that she could not guarantee hours but that she would give the claimant as many hours as she could. She read through all of the contracts with the claimant and explained them to the claimant.

When the claimant informed the Director in September 2008 that she was pregnant the Director congratulated the claimant but advised her that she did not know how much work she would have in a few months. When she mentioned the claimant's use of a moped; it was as a general concern. It was later confirmed that the claimant had suffered a miscarriage. This did not have an impact on the claimant's employment status as a further temporary contract to cover sick leave was issued to her on 1<sup>st</sup> November 2008.

The claimant's position could not be supported because of the budget. Two employees had returned from maternity leave and one from sick leave. This was the reason the claimant's employment was terminated and not because of her pregnancy. The Director of Nursing stated that other temporary employees had continued in their employment when pregnant.

**Determination:**

The Tribunal finds on the basis of the evidence adduced that the claimant was not dismissed due to her pregnancy. It was clear to the Tribunal that the dismissal occurred due to other reasons stated by the respondent (i.e. the temporary nature of the work and budgetary constraints) and evidence was adduced that other temporary employees who were pregnant had continued in their employment without issue. As the claimant did not have one year's continuous service it is not for the Tribunal to evaluate the reasons for dismissal. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)