

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD396/2009
RP402/2009
MN407/2009
WT176/2009

against

EMPLOYER – *respondent A*

&
EMPLOYER - *respondent B*

&
EMPLOYER – *respondent C*

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 M McAveety

Members: Mr M Murphy
Mr O Nulty

heard this claim at Mullingar on 15th July 2010

Representation:

Claimant(s) : Mr Shane Geraghty BL, instructed by:
Ms Jenny Devereux
E C Gearty & Co, Solicitors
4/5 Church Street, Longford, Co Longford

Respondent(s): Respondent A:
Mr Alex White, instructed by:
Mason Hayes Curran
South Bank House, Barrow Street, Dublin 4

Respondent B:
Ms Claire Hellen
IBEC
Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent C:
Programme Co-Ordinator

The determination of the Tribunal was as follows:

An adjournment application by Respondent A was refused.

Three preliminary points were raised. The first in relation to who was the correct employer. Three respondents were named and all disputed being the employer. The second was whether the application to the Tribunal was made in time. The claimant's date of termination was in dispute. The third as to whether the claimant had one year's continuous service.

Respondents' Case:

The Co-ordinator of Respondent C explained that she was an agent of the Department of Education and Science and was paid by Respondent A from August 2003 until December 2009 to run a school completion programme. The Programme was run by a local steering committee and operated in seven local schools. She had successfully applied to Respondent B for additional funding. Respondent A did not provide funding to the programme. The programme did not have its own bank account. Respondent A administered the funding. She understood that Respondent A was the employer as they administered the programme.

She gave guidance to the claimant in her role. She met the claimant in September 2003 to explain the ethos of the Programme. She did not give any documentation to the claimant in regard to her employment. She was informed that the school was happy with the claimant so she signed off on her time sheets for payment. The claimant last worked for the Programme in March 2008.

The representative for Respondent A contended that it only acted as a financial administrator for the Programme and that it was not the employer. Respondent A did not recruit the claimant and the normal employer/employee characteristics did not exist. The representative sought an adjournment, as the then CEO of Respondent A was unable to be present at the hearing to give evidence of the relationship of the Programme and Respondent A. The representative did not have documentation outlining how the scheme was operated.

In regard to the date of termination Respondent A contended that the claimant had contracts for each academic year. On her T1A form the claimant contended that the date of termination was October 21st 2008, however she had not returned to the school after the holidays in September 2008. May 2008 was the last time she had worked. The claim was lodged on February 17th 2009.

The Representative for Respondent B contended that it was not the employer and that Respondent C only rented a room in their offices. Any correspondence to the claimant on their headed paper was done in error.

Claimant's Case:

The claimant was employed on a part-time basis as a school counsellor through Respondent C. The claimant was paid by Respondent A. She met a representative of Respondent B in relation to her employment and received correspondence on Respondent B's headed paper.

The claimant's representative contended that Respondent A was the employer as the payslips and P60 name them as such. The claimant contended that she had continuous employment.

The employment began when the claimant was studying for her diploma in counselling. She had to work a number of hours to obtain her accreditation. In 1999, the Principal of the Community College, operated by Respondent A, offered the claimant voluntary hours. In 2000, the Principal asked the claimant to return in a part-time capacity. She did not receive a written contract of employment. Throughout her employment she submitted a part-time teacher's claim form to the Principal for signing and then forwarded to the School Secretary for payment. The claimant considered that the Principal was her manager and that Respondent A was her employer.

At the end of her first year of employment the Principal told her that they would see her at the end of September that year. She sometimes marked exam papers in June. She was told every year to return the following September/October.

Issues developed in regard to the employment in regard to hours of employment. In March the claimant spoke with the Co-ordinator of Respondent C and subsequently went on sick leave. She was not paid while on sick leave.

On July 1st 2008 the claimant, having sought mediation, met the Chairperson of Respondent B with a mediator. The meeting lasted for 30 minutes. The claimant put forward her issues and the Chairperson said that they only had funding for six hours and that was all she was giving the claimant. The claimant worked well in excess of six hours per week and until 2003 she had been able to claim for the hours that she worked. The claimant said that she was not returning under those terms.

The Chairperson produced a letter of resignation for the claimant but the claimant refused to sign it. The Chairperson stated that she wanted to resolve the issue at management level. There was no contact from the Chairperson after the meeting. The claimant decided to cut her losses and sign the letter, but she did not submit it. She went to see a solicitor.

The claimant went to the school in September and met the Principal. The Principal was unaware of her situation and said that she wanted the claimant to return and encouraged her to see a solicitor.

In the summer of 2008 the claimant required an insurance form to be signed by her employer. She asked the Principal but she said that she was not the claimant's employer. Ultimately they signed the form but they wrote that they were not the employer.

In September 2008 the claimant's representative wrote to the county CEO of Respondent A. He responded by stating that the Respondent C was the correct employer. The claimant named Respondent B as a respondent as their name appeared on documentation given to her.

The claimant's representative wrote to Respondent A stating that if no response were received they would consider the claimant's employment to have ceased on October 21st 2008. No P45 was issued.

During cross-examination the claimant stated that she was normally paid until May every year. In 2008 she worked until March, but was only paid up to the end of February.

During cross-examination the claimant denied that she had left her employment. She had expected

mediation to resolve her issues but it didn't. She wanted to return but felt she couldn't return under the same conditions that she had prior to her sick leave. She agreed that there was no one from Respondent A at the mediation session.

The claimant was unaware that the chairperson of Respondent B met her in her capacity as Chair of the School Completion Programme.

Determination:

Pursuant to the provisions of Section 8(2) of the Unfair Dismissals Act, 1977 as amended by Section 7 of the Unfair Dismissals (Amendment) Act, 1993, a claimant must bring a claim for Unfair Dismissal to a Rights Commissioner or the EAT within six months of the date of the dismissal, which said six months is extendable to a period of twelve months if the claimant can prove that there are exceptional circumstances which prevent him/her from lodging his/her claim within the six month period.

It has been contended on behalf of the respondents that the claimant last worked in May 2008 and since the claim was only lodged on February 17th 2009, that the claim is out of time. On the contrary, the claimant contends that her employment ceased on October 21st 2008 in accordance with the terms of a letter written by her solicitor. The Tribunal have carefully consider the arguments of both the claimant and the respondents and the facts adduced in support of both arguments and find that the claimant was out on sick leave from her place of employment since March, 2008. Notwithstanding the fact that the school term ended in June 2008, a practise had arisen whereby she became accustomed to being asked to return each September.

The claimant in her evidence claims that due to her work conditions, she was out on sick leave. This fact has not been denied by the respondent and indeed, the parties engaged in what was intended to be mediation on 1st July 2008. In that process, the claimant was presented with a resignation form for execution which she took home with her to consider. The Tribunal places no significance on the fact that the copy of the resignation form before the Tribunal was signed as it is acknowledged by all that the signed version was never delivered to any party. Therefore, the Tribunal concludes that there was no resignation by the claimant as at the 1st July 2008.

Further evidence was adduced that the claimant attended at the school in September 2008 and the Principal advised her that she wanted her to return. The Tribunal finds that at this point in time, the claimant was still trying to find a solution to her issues with her employer and therefore that no termination of employment had occurred. Thereafter the claimant engaged a solicitor to enter into correspondence on her behalf to pursue her cause and that action ultimately culminated in a letter from her solicitor dated 6th October 2008. That letter specified a period of 14 days thereafter, that is the 19th October as the final date by which a formal response to same should be received, failing which the claimant would treat herself as having been dismissed. The Tribunal finds that this date of the 19th October 2008 is the date of termination of employment.

Since the claim was presented to the Tribunal on the 17th February 2009, the claim is within time.

The respondents have raised a further preliminary argument as to whether or not the claimant had the requisite 12 months continuous service. To ground an application for Unfair Dismissal under the Unfair Dismissals Act, 1977 to 2007, a claimant must have one year's continuous service calculated pursuant to the provisions of Schedule 1 of the Minimum Notice and Terms of

Employment Act, 1973. Service is deemed to be continuous unless otherwise broken. Continuity of service is not broken by sickness or injury.

The evidence adduced by the claimant is such that she commenced employment in September 2000 after having completed an appropriate period of time there as required for accreditation for her Diploma in Counselling. She would work there for the duration of the school year until it ended in May. She would then be told to return in September. The Respondents contend that the claimant was employed on a series of Fixed Term Contracts all of which ended in May of the academic year.

The claimant has sought to rely on the provision of the Protection of Employees (Fixed-Term Work) Act 2003.

However, in the academic year prior to the claimants claim to the Tribunal, the claimant commenced employment in September 2008. She fell sick in March 2008 and was diagnosed as suffering from work related stress and absented herself accordingly, on her medical advice. Whilst she was not been paid for this period of absence, she remained in communication with her employer. In any event, the Tribunal finds that pursuant to the provisions of Schedule 1, her service was not broken by such sickness.

The Tribunal has further considered the evidence leading up to and including the attempted mediation of the 1st July 2008, wherein the claimant was presented with a resignation form for signing. The Tribunal finds that the presentation of such form to the claimant must imply that she was still employed on the 1st July 2008 and that she continued to be in continuous employment with them on that date.

The Tribunal has then considered the events which occurred thereafter. Evidence has been given that the claimant returned to her place of employment and was advised by the Principal that they wanted her to return to work. Correspondence was entered into which culminated in a letter from her solicitor dated 6th October 2008 which placed a 14-day deadline on resolution of the claimants issues, failing which resignation would follow. The Tribunal finds that resignation was effected on the 19th October 2008.

Whilst the Tribunal finds that in the academic years, 2000 to May 2007, the claimant was employed on a series of fixed term contracts, which do not fall within the protection provided in Section 2(b) of the Unfair Dismissals Act, 1977, Section 2(5) of the Unfair Dismissals Act, 1977 or Section 9 of the Protection of Employees (Fixed Term Work) Act, 2003, the Tribunal hold that the academic year 2008 did not end as before in May, 2008. The Tribunal place significant weight on the fact that a resignation form was presented to the claimant at her mediation and hold that, such actions indicate that there was no break in service at that point and further since the form was not returned signed, service was not broken thereafter.

Service was only broken by the expiration of the 14-day deadline, which effected termination of the contractual relationship. Accordingly, the Tribunal finds that the claimant had the requisite one years continuous employment and they have jurisdiction to hear the case.

The Tribunal has decided to postpone its decision on the correct identity of the employer until such time as all of the evidence has been heard. However, the Tribunal directs that all parties should have available for the Tribunal, at the next hearing of this action, for further consideration of this issue, the following documents; copies of all departmental rules and/or instructions, copies of the periodic reports that would have been completed and sent to the relevant funding agencies, copies

of all applications for funding, copies of any contracts of employment or terms of engagement, copy P60's and any other relevant documents. Such documentation must be made available at the next hearing of this action.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)