

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD208/2008

-claimant

against

EMPLOYER

-first named respondent

EMPLOYER

-second named respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell
Members: Mr J. Hennessy
Ms S. Kelly

heard this claim at Waterford on 27th April 2010
and 28th April 2010

Representation:

Claimant:
Ms Deirdre O'Connor, INTO,
Senior Official, 35 Parnell Square, Dublin 1

First named respondent:
Mr. William Fitzgerald BL instructed by
Mr. Gerard O'Herlihy solicitor, Nolan Farrell
& Goff, Solicitors, Newtown, Waterford

Second named respondent:
Ms M. P Guinness BL, instructed by Mr. David Hickey
Solicitor, Chief State Solicitors Office,
State And European, Litigation Section,
Ormond House, Little Ship St, Dublin 2

Background:

The claimant in this case is a schoolteacher. There were two named respondents in this case. Having heard legal submissions the Tribunal made an initial determination which appears hereafter holding that XXXXXXXX was not the Claimant's Employer.

Respondent's case:

The respondent representative in opening their case explained that the claimant worked in three different schools; her hours were spread between a cluster of schools. There were three schools involved but her contract was with the first named respondent. The claimant is now in full time post with another school. The department terminated the contract and wrote to the claimant. The school notified the claimant that it was an act outside of the schools control.

The Tribunal heard evidence from the school principal. He explained that the claimant commenced in 2005. She was initially contracted for a year up until August 2006. She had 13.5 hours in the respondent school and 11 hours in school two. In her next contract her hours were 10 hours.

The witness gave extensive evidence as to the change in the claimant's hours and contracts. In or about September 2006 a department official verbally awarded the claimant with a contract of indefinite duration. This was not done in writing.

On 15th March 2007 the department issued a letter to inform of the decision that the claimant's post was suppressed. The witness explained that ordinarily the claimant would go onto a panel, however as the claimant was secondary school trained the department would not allow her to go onto a panel. The school had no choice in the matter as the department issued the letter.

The hours the claimant did or her post, were still available however the Board Of management decided to advertise the post.

In cross-examination the witness explained that the situation was unusual in that it was "uncharted ground". The department offered a contract of indefinite duration. They advertised the position as the claimant had a case before a Rights Commissioner.

Claimant's case:

The claimant's representative in opening their case explained that the hours allocated were connected to a number of children. The child with the five hours allocated who was in the claimant's care is still in the school.

The claimant gave extensive evidence as to her hours of work. She explained that if she had been offered the five hours that were available after her contract had been ended she would have done the five hours.

The claimant gave evidence as to her loss. She became full time employed with another school in December 2009.

Closing:

The respondent representative contends that the claimant's post was suppressed by XXXXXXXX. The claimant was on a contract of indefinite duration and this was terminated by the department. The contract of indefinite duration allows for itself to be terminated. The decision of the department frustrated the contract. The school was in an unusual situation, the school advertised the post and awarded the post and in doing so acted reasonably.

The claimant's representative contends that there was five hours available and that the school was in funds and instead of respecting the contract of indefinite duration they advertised the post.

The respondent representative told the Tribunal that the school principal advertised the post because the matter was before a Rights Commissioner.

Determination:

1. The Tribunal was first asked to determine if the XXXXXXXX was the Claimant's Employer.

While the letter from XXXXXXXX to the Claimant of the 15th of March 2007 furnished to the Tribunal serves to "muddy the waters" insofar as it seems to indicate that her post was being terminated by the XXXXXXXX itself, the legal position is clear.

While there is clearly some "artificiality" about the arrangement the Tribunal is bound by the existing law which is clear.

The Board of the School deals with the appointment of teachers and their termination. The Education Act 1998 so provides particularly at section 24.

Approved Schools who receive funding from the State are subject to Departmental Regulation which sees certain conditions attached to funding. In this regard the actual terms and conditions of the employment may be set out by the Minister under Section 24 (5) of the Act. The Tribunal recognises the uniqueness of the relationship, however, the Department is paymaster only. This does not make the Department the Employer.

In her judgement of the 17th of February 2009 in the case of "High Court Review between Board of Management of St. Molaga's National School and

Department of Education & Others” Ms. Justice Mary Irvine confirmed the respective roles of Board and Department.

2. The Claimant held a Contract of Indefinite Duration with XXXXXXXX (the base school) to provide full time Resource Teacher Services to this school and to another school in a cluster arrangement. Clause 5 of the Claimant’s contract allows for dismissal for an unavoidable circumstance.
3. In addition, the Tribunal believes that the contract is governed by the provisions of the Education Act 1998 and is subject to implied terms that follow from the involvement of the XXXXXXXX in the funding of approved schools. Specifically, the Tribunal believe that it was an implied term of XXXXXXXX Contract that its continuation was conditional upon the availability of Departmental funding.
4. In the event, funding for the position of full time Resource Teacher was withdrawn which necessitated the termination of XXXXXXXX contract.
5. It is not accepted that the Claimant had any entitlement under her terminated contract to the reduced hours and temporary position available for the academic year commencing in September 2007. The temporary post was not the post for which the Claimant was contracted under the Contract of Indefinite dated 29th of September 2006. The relevant circular from the Department given under the Education Act 1998 calls for an open competition for any temporary position. ,

Accordingly the Tribunal finds that the Claimant’s assertion that she was unfairly dismissed is unfounded.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)