

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*
MN1180/2009

CASE NO.
UD1170/2009

against

EMPLOYER - *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Donegal on 11th February 2010
and at Sligo 20th April 2010

Representation:

Claimant: Mr Alastair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster
Street, Galway

Respondent: XXXXXX

Preliminary issue

The respondent maintained that the claimant was not eligible to bring a claim under the Unfair Dismissals Act 1977 – 2007; he had been employed under fixed term contracts. The first fixed term contract was dated 29 June 2005 which included a waiver of the Unfair Dismissals Acts 1977 – 2007, this was renewed a year later with the same conditions. During this contract he applied for an assistant engineers position with the respondent and was successful so he resigned his graduate engineering position and was engaged on a fixed term contract on 24 April 2007. This contract also included a waiver of the Unfair Dismissals Acts 1977 – 2007. This contract was renewed again on the 24 April 2008 and the contract and the claimant's employment terminated on the 23 April 2009. The respondent's representative maintained that the Unfair Dismissals Acts 1977 – 2007 did not apply as the claimant's position terminated naturally. She referred to section 2(2) B of the 1977 Act stating that it did not apply as he was engaged on a number of fixed term contracts each of which was for one years duration.

The claimant's representative raised the issue whether the contracts given to the claimant were in fact to avoid the Unfair Dismissals Act 1977 – 2007.

The Tribunal decided to hear the case to establish the facts.

Respondent's Case

The HR manager at the time of the claimant's recruitment in 2005 gave evidence on behalf of the respondent. The claimant was recruited as a graduate engineer with a contract in the NRD (National Road Design) office in Donegal town on a fixed term contract for one year. The NRD is funded by the NRA (National Road Authority) and they approve the staff complement of the NRD. The claimant, as a graduate engineer assisted a senior engineer. The claimant's role is not normally a permanent position. Permanent staff were recruited to the NRD during the years 2005 to 2009 in engineering, clerical and mechanical roles. The claimant's contract was renewed in 2006 for one more year as a result of a recommendation from the claimant's line manager.

In 2007 the council found it necessary to establish a panel of assistant engineers, the claimant was successful in obtaining this position and was issued with a fixed term contract for one year. This required the claimant to resign from his position of graduate engineer. He continued to work in the NRD office. This contract for assistant engineer was renewed in April 2008 for a further year. The NRA's funding and staffing had been allocated in January 2008.

In July 2008 the government announced that all public services had to achieve a 3% saving in payroll costs. This necessitated that the respondent review all their temporary contracts and they contacted all the contract holders informing them of same. They reviewed all these contracts, did not fill vacancies that had occurred through natural wastage, and cut their overtime and allowances to achieve the required savings. The reviews of these contracts were ongoing and were discussed by senior management on a regular basis. There was no specific conversation in relation to the claimant's contract in this forum. The claimant was informed by letter on 9 December 2008 that it would be unlikely that his contract would be extended beyond 23 April 2009 due the financial constraints placed on the respondent. The claimant did not contact this witness on receipt of this letter.

The respondent was aware that funding for the NRD office was to be significantly cut in 2009 and the NRA were anxious that staffing levels be cut. On 4 March 2009 the HR Manager wrote to the claimant informing him that his employment would terminate on 23 April 2009. The claimant's solicitor wrote to the respondent raising a number of queries in respect of the claimant's termination of employment. The respondent replied on 21 April 2009. Following this response the claimant made a claim to the EAT. The claimant was paid his statutory redundancy

Between 2008 to the end of 2009 the respondent did not renew any temporary contracts. In June of 2008 they had 1340 full-time employees which was reduced to 1007 by the end of 2009, this was as a result of the non-renewal of contracts and the retirement scheme. There is a moratorium in place on recruitment, so they cannot recruit any staff without prior approval from their parent department. There are careful criteria that have to be considered before seeking approval for recruitment from the department. The claimant's role did not fit in to this criterion.

Under cross examination this witness outlined that their records showed that between the period

2001 to 2008 more temporary contracted staff were recruited than permanent staff. When a permanent post arises it is filled through an open competition. At present there are no employees on temporary contracts in the NRD office. The staff structure in the NRD office is approved by the NRA, currently there is a core staffing of 22 but at the moment there are 23. It was normal practice when a graduate engineer was successful in obtaining the position of Assistant Engineer that they would resign from the position of graduate engineer before taking up their new position. He could not recall any graduate engineer not resigning before taking up a new position within the respondent. The overall funding for the NRD office in 2008 was €21 million, €10 million in 2009 and €12 million in 2010.

The witness was referred to a letter from SL (who was the claimant's line manager) to the senior engineer requesting that the claimant's contract be extended for another six months or at least to the end of 2009. The witness had not seen this letter until the day of the Tribunal hearing as it was addressed to the senior engineer, however it would not be unusual for representation to be made on behalf of employees. However in his role as HR manager he had to ensure that all employees were treated equally and fairly. In his letter to the claimant's solicitor of 21 April 2009 he had outlined that the NRA had informed them that sufficient funding was not available to maintain the staffing levels in the NRD in 2009. It was put to him that while the funding may have been reduced, the claimant's workload had remained intact. He replied he was not familiar of how the funding was broken down but the claimant's workload would have been reassigned. The claimant was entitled to redundancy as he had worked for over two years with the respondent. No other alternatives were discussed in relation to the claimant. Only those on temporary contracts who had acquired rights under legislation were retained in employment.

He explained that the NRD office in Donegal looks after national and secondary roads while their office in Lifford looks after regional and local roads. It was put to him that employees NC and JG were currently working in the Lifford office and both had less service than the claimant. The witness confirmed that JG had longer service than the claimant and that NC had commenced employment after the claimant but is employed as a graduate engineer. The funding for both the Donegal and Lifford office is different. NC may have been awarded a two-year contract and as a consequence of this may have acquired rights. The respondent had no issue with the claimant's performance.

The next witness gave evidence that he is the Director of Services for the respondent organisation. He has direct responsibility for the National Roads Design Office (NRDO). This office is 100% funded by the NRA. While staff are employed by the respondent their work is determined by the NRA. The respondent's core staff was augmented by staff on fixed term contracts depending on the respondent's workload. Extensions to these fixed term contracts were only given if the workload, money and approval had been granted by the NRA.

Towards the end of 2008 the NRA imposed a cut to its funding imposing new limits. In order to meet these new limits it was necessary for the respondent to downsize its staffing numbers. The respondent was told by the NRA not to renew temporary contracts and to return to its core staffing levels. Funding for major contracts ceased and major contract work was suspended.

Under cross examination he confirmed that the claimant's work load has been subsumed by the organisation's core staff. Some of his workload has been allocated to a staff member returning from secondment. He confirmed that temporary contracts were not renewed for all employees with less than 4 years service when they came to the end of their natural duration.

Claimant's Case

The claimant's representative submitted that the series of fixed term contracts given to his client were issued in order for the respondent to avoid liability under the Unfair Dismissal Acts. No redundancy situation existed and the job that the claimant was doing existed at the time of his dismissal and still exists today. The claimant was not offered any alternative working arrangement, for instance re-deployment or part-time work. This fact automatically makes the claimant's dismissal unfair. Furthermore the selection method used was ham-fisted and no consideration was given to any other selection method other than selecting employees employed on a fixed term contract. No consideration was given to a voluntary selection for redundancy. The claimant remains unemployed to date despite numerous attempts and applications to gain alternative employment.

Determination

The Tribunal has carefully considered the evidence heard and the submissions of the parties. It is common case between the parties that the claimant was issued with a series of fixed term contracts. These contracts excluded the operation of the Unfair Dismissals Acts 1977 – 2007 on their expiry.

The claimant's final contract expired on 23 April 2009, less than 4 years after the commencement of his first fixed term contract in June 2005. The claimant's case is that the series of fixed term contracts issued to him were done so as to avoid the operation of the Unfair Dismissals Acts 1977 – 2007, and that he was therefore entitled to the protection of the Acts, and that his selection for redundancy was unfair, or alternatively that there was no genuine redundancy situation.

The respondent's evidence was that the claimant's contract merely expired by passage of time, and no funding was available to offer him a further contract, and that earlier contract renewals were on objective grounds based on the funding available from the NRA.

The Tribunal accepts the evidence of the respondent in this regard, and that there were objective reasons for the granting of the claimant's contracts for a fixed term. The Tribunal therefore determines that the claims under the Unfair Dismissals Acts 1977- 2007, and the Minimum Notice and Terms of Employment Acts 1973 - 2005 fail and are hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

