

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD352/2010
RP525/2010

- *claimant*
against

EMPLOYER
- *respondent*
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Jordan
Mr J Goulding

Heard this claim at Glenview Hotel, Glen of the Downs, County Wicklow on 18th April, 2011

Representation:

Claimant: Ms Mary P Guinness BL instructed by O'Mara Geraghty McCourt, Solicitors,
51 Northumberland Road, Dublin 4

Respondent: Ms Ger Moriarty, Local Government Management Services Board,
Local Government House, 35/39 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:

The fact of dismissal was not in dispute. It was the respondent's case that the respondent had terminated the claimant's employment by way of redundancy and that the claimant had been selected for redundancy substantially on the basis that the claimant was employed under a contract of fixed duration which had expired. It was the claimant's case that the claimant was, by operation of law, employed under a contract of indefinite duration and therefore the claimant had been unfairly selected for redundancy.

Following evidence and lengthy and detailed submissions on the issue as to whether the claimant was employed under a contract of fixed or indefinite duration the Tribunal found that the claimant had been employed on a contract of indefinite duration at the time of his cessation of employment.

Having ruled on this issue the Tribunal afforded the parties to the opportunity to consider their position in the light of this finding. The Tribunal was then informed that the case had been resolved. The parties sought on consent an order of the Tribunal reinstating the claimant.

The Tribunal indicated that providing a fully reasoned decision could take some time, particularly given the length and complexity of the submissions, but that early reinstatement could be facilitated by the issuing of a less than fully reasoned decision and the parties then consented to this course.

It was the uncontroverted evidence before the Tribunal that the respondent had first employed the claimant on 26th July 2004. The period of this employment was stated to expire on 31st December 2008, approximately 4½ years later. The respondent purported to extend the period of the claimant's employment by way of a fixed-term contract for a further period from 1st January 2009 to 31st December 2009.

The Tribunal finds that section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 has application.

The Tribunal finds that the claimant was employed by the respondent subsequent to the passing of the Act of 2003 and therefore subsection 9(2) is the applicable subsection and it provides that:

“Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first contract is passed is subsequent to the date on which this Act is passed, the aggregate duration of such contracts shall not exceed 4 years.”

The Tribunal finds that the aggregate of the two contracts was 5½ years in contravention of subsection 9(2) and the Tribunal therefore finds subsection 9(3) has application and it provides that:

“Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.”

The Tribunal notes the evidence and submissions on behalf of the respondent that objective grounds existed as per subsection 9(4) below:

“Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal.”

It was an uncontroverted fact that funding was allocated by central government to the respondent, a local government authority, on a five-yearly basis. A purpose of the funding was to support local authority enforcement actions through the recruitment of additional enforcement staff. The grants were for the specific purpose of employing additional enforcement personnel. Subsequent to the sanctioning of this funding the claimant was employed by the respondent as an Environmental Warden and thereby as an additional member of the enforcement staff dealing with the unlawful dumping of waste. It was the respondent's case that the fact that funding was only allocated on a fixed-term basis constituted objective grounds justifying the provision of a fixed-term contract.

The Tribunal finds that the circumstances outlined by the respondent did not constitute “objective grounds” for the purposes of subsection 9(4). In particular the Tribunal was not satisfied that the period of the allocation of the funds was sufficiently linked to the claimants employment to constitute such grounds. It was accepted by both parties that the respondent as a local government authority had a statutory duty in relation to waste that pre-dated the claimant's employment and is indeed a continuing statutory duty. The Tribunal is of the view that a local government authority has a reasonable discretion in the numbers of staff that it chooses to allocate to the carrying out of

its many and various statutory duties. The Tribunal regards the funds allocated by central government to have been in the nature of an inducement to the respondent to exercise its discretion by way of giving greater priority to waste enforcement issues than it might have otherwise done. The Tribunal considers the funding to be in the nature of a fixed-term inducement to bring about a change of indefinite duration in the priorities of the local government authority. The Tribunal distinguishes this case from those cases where a third party provides funding for a specific position or project for a fixed term and the position or project is wholly dependent and conditional upon that funding.

It is notable that it was as a result of cutbacks in the general budget of the local authority of approximately 3% that the respondent selected the claimant for redundancy despite the fact that the special purpose funding had been renewed by central government.

The Tribunal determines, on the consent of the parties, that the claimant was unfairly dismissed and awards reinstatement under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal therefore dismisses the claim under the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)