

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

-claimant

CASE NO.
UD1909/2009

Against
EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S. C.

Members: Mr F. Moloney
Mr. J. Dorney

heard this claim at Dublin on 14th April 2011
and 15th April 2011

Representation:

Claimant: Ms Claire Bruton B.L. instructed by Denis McSweeney, Solicitors, 1 Upper Grand Canal Street, Dublin 4

Respondent: Mr. Conor Power B.L. instructed by McCann Fitzgerald, Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2

Background

The respondent is a national organisation broken down into regions for management and budget purposes. The claimant was employed as a Senior Medical Officer (SMO) in the North-West Dublin region involved in the area of Community Care.

Respondent's Case

The claimant was employed on a temporary specified purpose contract to replace a SMO that had left employment with the respondent. The claimant's contract states, 'your employment with (the respondent) shall be for the purpose of filling a vacant post pending the permanent filling of the post through open competition.'

In April 2007 KF received a request from Dr.X a SMO working with the claimant, to take a career break in order to complete 4 years of training in a different area of the respondent. The application to take a career break was withdrawn, as the SMO would continue to work and train within the respondent. It was decided Dr. X would be transferred to the other region for the 4-year duration of

her training effective from the 30th of June 2007. Interviews were held to replace her but a suitable candidate was not found. The respondent was directed that as of the 31st of December 2007 only the posts occupied would remain; as Dr.X's vacancy had not been filled the vacancy was lost to the region.

Dr. X requested to return to her post after two years of her intended four years training. As Dr. X was a permanent employee she had to be accommodated in the post she had vacated. In order to do this the following options were outlined by KF and sent by e-mail to the overall Local Health Area Manager (AoC);

1. *'Explore the possibility of an SMO vacancy in the greater Dublin Region...*
2. *Examine existing staffing with a view to replacing temporary assignment with a permanent one*
3. *Suppress a WTE (whole time equivalent) elsewhere in the system to allow for an increase in the medical officer service ceiling*

The only other option I can think of is to see if it's possible to have the WTE and budget transferred from the training scheme to the NWD...Dr. X requested that I refer her case to senior management with a view to having the matter resolved as a matter of urgency.'

Option one was explored but no suitable vacancy was found to exist or found to be coming up in the future. Option 3 was not viable. AoC made the decision to follow option 2 and instructed KF to inform the claimant that her employment was terminated. This would normally be carried out by the claimant's line manager but, as he refused, KF was given the task. The fourth option was not followed up as it was unlikely that the training programme management would agree to losing a dedicated training post. The higher training post was paid through a separate budget and could not be transferred to community care in any area.

The Local Health Manager for the Area (AoC) gave evidence. Following the request from Dr. X to return from training, a position had to be found for her, as she was a permanent employee. The moratorium prevented the creation of a new post and her original post had been lost, as the vacancy was not filled. KF researched and sent the above options to AoC who chose option 2, as it was the only viable choice. There was a choice of two equivalent staff members in temporary positions; the claimant was chosen as she had less service. If Dr. X had not requested to return the claimant would have remained in her position.

The Employee Relations Manager (JK) gave evidence on the government decision and resulting circulars that prohibited the creation of new posts, filling posts and holding open competitions. The government decision creating a moratorium on recruitment stated that, *'no public service post, however arising, may be filled by recruitment, promotion, nor payment of an allowance for the performance of duties at a higher grade. Therefore when vacancies arise (the respondent) must reallocate or reorganise work or staff accordingly.'* The respondent implemented this decision by circular 10/2009 and amended it by circular 15/2009, which lists numerous positions that are exempt from the moratorium. The claimant's position is not included in this list.

The claimant's contract stipulates that, *'your employment with (the respondent) shall be for the purpose of filling a vacant post pending the permanent filling of the post through open competition.'* There was no prospect of an open competition in the future and the *'specified purpose'* of the claimant's contract had come to an end with the return of a permanent

SMO.

The respondent contends that Dr. X was a permanent employee and therefore had to be accommodated in her original position. There was no position available for her and due to the moratorium a position could not be created; the only option left to the respondent was to dismiss a temporary staff member to accommodate the permanent staff member. The claimant's contract was temporary pending the vacancy being filled permanently. Dr. X's return filled this position permanently.

The moratorium was a government decision and although the respondent was the author of circular 10/2009 and 15/2009 which implemented the particulars of the decision, the respondent was bound by the overall principle of the Decision, as set out in Sec 7 (5) (c) of the Health Act 2004 which states,

'In performing its functions, (the respondent) shall have regard to –

the policies and objectives of the Government or any Minister of the Government to the extent that those policies and objectives may affect or relate to the functions of (the respondent).'

Claimant's Case

An application was made by Counsel for the claimant that the respondent had not shown substantial grounds justifying the dismissal.

Determination

The respondent made a preliminary point that the claimant's employment was excluded from the Act under section 2(b), as a fixed purpose contract. The Tribunal rejected this point, as it is settled law that any such contract must be construed strictly because of section 13 of the Act.

The respondent later argued that the respondent was forced to dismiss the claimant because of the Government moratorium on employment, which was a supervening legal event, and relied on two Circulars which it argued were legally binding on the respondent.

We understand that the local management might consider themselves bound by the Circulars, but the respondent is the organisation as a whole. These Circulars were actually drafted by the respondent itself. Indeed the second Circular was an amendment to the first one, indicating quite clearly that the respondent considered itself free to change the details of how the moratorium was to be applied. The Circulars could not be described as an external supervening effect.

The only external document produced to the Tribunal was a letter from the Department of Finance, which stated the Government policy in relation to staffing. This letter refers to re-organisation and re-deployment of staff, and to non-renewal of temporary contracts. It makes no mention of dismissals as such.

The Tribunal cannot accept the respondent's argument, and finds that it has failed to show a substantial ground justifying dismissal. The dismissal is therefore deemed to be unfair under section 6(1) and section 6(6) of the Act.

In considering the form of redress under Section 7 of the of the Unfair Dismissals Act 1977, we note that all parties agreed that the claimant was an exemplary employee, the Tribunal considers she should resume employment.

The Tribunal do not consider full re-instatement is appropriate, as under Section 7(a) reinstatement is deemed to commence on the day of dismissal. The claimant had earnings from other employment after her dismissal and for this reason the Tribunal do not think it appropriate that she receive full back pay.

Accordingly the Tribunal determines that the claimant should be re-engaged under section 7(1)(b) of the Unfair Dismissals Act 1977 which provides for, 're-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or'.

This re-engagement is to the position she held before dismissal, on the same terms and conditions, but also with the following terms and conditions, which the Tribunal find are, 'reasonable having regard to all the circumstances';

- a) Her re-engagement takes effect from the 1st of August 2009
- b) Her remuneration shall be payable from the 1st of September 2010
- c) For all purposes other than payment of remuneration the service shall be deemed to be continuous with her earlier service under her contract of employment

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)