

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE - *claimant*

CASE NO.
UD630/2010

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. Casey
Mr. D. McEvoy

heard this claim at Cork on 03 June 2011

Representation:

Claimant: Ms. Colleen Minihane, Siptu, Connolly Hall, Lapp's Quay, Cork

Respondent: Mr. Terry O'Driscoll B.L. instructed by James Baylor, Solicitors,
2 O'Rahilly Row, Fermoy, Cork

Preliminary Issues

1. The respondent contended that since the claimant was employed under a FÁS.-funded training scheme the Tribunal does not have jurisdiction, by virtue of 2 (1)(f) of the Unfair Dismissals Act 1977, to hear the claim.

The claimant's position is that she was employed directly by the respondent and was paid and received payslips from the respondent. The claimant's contract of employment is between her and the respondent directly; she had no relationship with FÁS.

2 The respondent further contended that the claim was lodged outside the statutory 6-month time limit prescribed by section 8 (2) of the Act. The claimant's position is that the claim was lodged in time with the Rights Commissioner Service but the respondent objected to a hearing of the claim by a Rights Commissioner and this delayed the lodging of the claim with the Employment Appeals Tribunal.

Determinations on the Preliminary Issues

1. Section 2 (1) of the Unfair Dismissals Act 1977 provides that the Act shall not apply to ...

(f) a person (other than a person employed under a contract of employment) who is receiving a training allowance from or undergoing instruction by An Chomhairle Oiliúna or is receiving a training allowance from and undergoing instruction by that body

Under the Labour Services Act 1987 the relevant functions of An Chomhairle Oiliúna were taken over by FÁS. The words in brackets in subsection (f) above specifically remove “a person employed under a contract of employment” from the exclusionary effect of section 2 of the Act of 1977. Accordingly, the Tribunal has jurisdiction to hear the claim.

2. Since the claim under the Unfair Dismissals Act 1977 was lodged with the Rights Commissioners Service within the statutory 6 month period as prescribed by section 8 (2) of the Unfair Dismissals Act 1977 as amended, the Tribunal is satisfied that time stopped running against the claimant under the Act at that time. Accordingly, the Tribunal has jurisdiction to hear the claim under the Unfair Dismissals Act 1977.

Summary of the Evidence

The claimant started temporary employment in the community on 26 February 2007 on a Community Employment Scheme. The particular scheme was geared towards getting the long-term unemployed back to work. The training scheme was funded by the government through FÁS, which determines the eligibility of the participants for the scheme. The claimant’s contract with the respondent was on a 12 months basis and she was aware that FÁS had to approve funding for her participation in the scheme on an annual basis. In April 2009 it was discovered that because of the nature of the payment/pension she was receiving under the Occupational Health Regulations of Social Welfare she was not eligible to be on the scheme. Her placement on the scheme had been due to a clerical error.

FÁS immediately informed the respondent of the position and instructed that the claimant must be removed from the scheme. Initially the claimant was informed that her contract was to be terminated from the 1 May 2009 and that she could not now complete the remainder of her contract which was due to expire in February 2010. Due to the intervention of the respondent her contract was later extended to 31 July 2009, which date was the annual ending of the scheme as well as the completion date of a diploma course on Community Development, on which the claimant registered and which was also funded by FÁS.

The respondent is a voluntary body and has no independent income; six of its staff are funded by FÁS and one is funded by the H.S.E. The respondent has to apply to FÁS every year for funding for each participant. The funding is granted on an annual basis for one year and may be extended up to a maximum of three years. Funding is granted for the participant rather than the position. The claimant was aware that if FÁS did not approve the funding the respondent would not be able to continue her employment as her job depended on the funding. The claimant accepted that she was not eligible for the scheme. She had not received a copy of the contract between FÁS and the respondent.

Determination

The Tribunal finds that a supervening event (the withdrawal of funding for the claimant's position on the scheme by FÁS which was outside the control of the respondent, discharged the contract. As was pointed out in a landmark case on frustration, *Krell v Henry* [1903] 2 Kings Bench 740 at 748, frustration of contract is not restricted to physical impossibility of performance of the contract but also applies to "cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance". The Tribunal finds that the removal of funding for the claimant which resulted in the respondent's inability to pay her was such "a state of things going to the root of the contract and essential to its performance". Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)