

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

MN1967/2010

CASE NO.
UD2027/2010

- *Claimant*

WT897/2010

Against

EMPLOYER
- *Respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr C. Corcoran B.L.

Members: Mr M. Noone
Mr J. Flannery

heard this claim at Dublin on 27th February 2012

Representation:

Claimant: Ms. Maeve Brennan, B.L., Ms Claudine Hanratty, Claudine Hanratty & Company,
Solicitors, 1 Main Street, Tallaght, Dublin 24

Respondent: In Person

The determination of the Tribunal was as follows:-

Respondent's Case

The Tribunal heard evidence from JM Senior, the founder of the respondent company, who established the company in 1981. Shortly after the company commenced trading he hired the claimant. He did not issue the claimant with a contract, although he did provide him with terms and conditions orally.

The claimant's rate of pay was determined at the beginning of each tax year and JM Senior and the claimant would negotiate his rate of pay based on nett figures. The claimant was also paid expenses for working from his car. JM Senior found the claimant to be a good, safe

worker and never experienced any problems with his work.

Any communications in respect of wages were face to face between the respondent and the claimant. In 1991 JM Senior enrolled the claimant into a contributory pension fund, which was not a defined benefit scheme, to ensure that he had a pension when retiring at the age of 65. The claimant was aware that one of the conditions of the scheme was that he would retire at the age of 65 and he never objected to this condition.

In 2003 JM Senior and the claimant had discussions about increasing the claimant's pension. The pension funds were starting to decrease and the claimant was concerned that he would not receive a lot at his time of retirement. As a result of this the claimant's pension fund was boosted by €60,000.00 from 2004-2010 in addition to what was already in the fund. The claimant was in agreement with this arrangement and told JM Senior that his own financial advisor had said that the company were very generous to him.

There was never any question that the claimant would not retire at 65 until five or six days before his 65th birthday. There was a meeting with the claimant on 26th May 2010 to discuss his pension options. On 22nd June 2010 he signed for his pension with the pension broker. JM Senior confirmed that the claimant got his pension from the scheme. He was not aware how much the claimant received because he did not know what option the claimant selected.

At the meeting on 26th May 2010 the claimant spoke about his post retirement plans and expressed that he wished to work part time with the company after his retirement. He had also spoke about this in general conversation from time to time and there was always acceptance that he would work part time after his retirement.

The claimant was in receipt of a widower's pension from social welfare and prior to his retirement he contacted them for advice on how his situation would change and what would be the implications to his widower's pension on retiring. Two days after this meeting he came to work and said that he did not want to retire. JM Senior was away on holidays at this time.

Throughout his employment with the company the claimant was treated well by the respondent, when his wife died in 2006 the company provided him with paid compassionate leave, and he was also given compassionate leave in 2008 when his brother died. The claimant suffered a heart attack in 2008 and was out sick for approximately 8 weeks. Throughout this time the company continued to pay him his wages and pension contributions. The company did not seek medical certificates from the claimant and left the decision to return to work up to the claimant and his doctor.

During cross examination JM Senior confirmed that the claimant never received a written contract, payslips or terms and conditions. In 1992 the claimant was given a document "statement of benefits" which stated the normal retirement age as 65.

JM Senior did not agree that the claimant wanted to work full time with the company after the age of 65. On 30th June 2010 the claimant received a letter from the company informing him that in line with company practice he was required to retire on 1st July 2010, his 65th birthday. JM Senior rejected that this was the only notice of termination of employment that the claimant received and it had been discussed with him many times.

The Tribunal heard evidence from JM Junior of the respondent company explaining that

the company reject the claimant's claim under the Unfair Dismissals Acts 1977 to 2007. The claimant was employed by the respondent as a fitter on 19th August 1981 by express oral contract. He was responsible for repair and replacement of heating and worked alone, out of the office in the greater Dublin area. It was necessary throughout his employment to travel around the country from site to site. The claimant would call to the site on a weekly basis to collect his wages and submit his workdockets.

JM Junior told the Tribunal that the claimant's work was of high quality and he got on well with all staff. The claimant always reported to JM Senior. JM Junior told the Tribunal that he had a conversation with the claimant in 2000 in which they discussed his options for post retirement. During this conversation the claimant told JM Junior that he would hope to continue working with the company on a part time basis.

On 14th May 2010 at a meeting to discuss the claimant's retirement options the claimant said that he wanted to continue working for the company on a part time basis after his retirement and he asked JM Junior would his rate of pay for part time work be comparable to which JM Junior replied in the affirmative.

On 22nd or 23rd June 2010 JM Junior received a phone call from the claimant requesting a meeting. They met on 24th June 2010 and the claimant told him that he would not be retiring and that he did not need to retire. JM Junior was stunned and could not accept this assertion. He felt that it was a breach of contract on the claimant's part.

JM Junior requested a medical certificate from the claimant for insurance reasons if he was to work past the age of 65. JM Junior confirmed to the tribunal that when the claimant returned to work after recovering from a heart attack the company did not seek a medical certificate.

During cross examination JM Junior did not agree that it was the company's position that the claimant would work part time post retirement. The arrangement was for the claimant to retire from the company and return on a part time basis. He said that the company did not force the claimant to retire, he had reached the age of retirement.

The claimant's representative asked JM Junior about treating the claimant differently than another colleague, SH, who worked with the company past the retirement age of 65. JM Junior explained that the contracts held by the claimant and SH were different. JM Junior disagreed that the claimant was placed at a disadvantage because he queried the retirement age.

The Tribunal heard evidence from MM who explained that SH had been made redundant by the company because due to the economic downturn MM had taken over responsibility for the company accounts. During cross examination MM did not agree that SH had been asked to retire from the company in the year previous. She also confirmed that she had never liaised with the claimant in a work capacity.

Claimant's Case

The claimant told the Tribunal that he assumed he would be working with the company after the age of 65. There was never any talk of him retiring at 65 but he was aware that his pension would mature when he reached that age and would be paid to him at that stage. The claimant envisaged continuing to work seamlessly with the company.

When the issue of part time work arose at a meeting there was no definitive decision reached. The claimant understood that this would be a 3 day week because of the downturn in the economy. The claimant was told that he would receive a break of one month from the company before commencing part time. He went away and thought about this and realised that the company were stopping his service and that a seamless move to part time work would not be happening. The company also wanted the claimant to sign a contract.

The claimant told the Tribunal that when he was given the “statement of benefits” form in 1992, which stated the normal retirement age was 65, all it meant to him was that he would receive his pension and lumpsum at this stage. He was never told that he would leave the company when he reached the age of 65.

When the claimant met with JM Junior on 24th June 2010 he asked him why he was being given one month off before commencing part time. The claimant had thought that he would continue working. JM Junior wanted the claimant to sign a contract at this stage.

The claimant did not receive any notice of his retirement from the company. The claimant ceased working with the company on 30th June 2010 but told the Tribunal that SH was given the opportunity to stay on with the company post retirement age and he was not afforded the same opportunity.

During cross examination the claimant confirmed that he never requested a written contract of his terms and conditions of employment. He agreed that he had made representations to JM Senior in respect of a 5% pay cut but did not agree that he had told JM Senior that it would not cost the company too much to exempt him from the pay cut because he was going to retire.

The Tribunal heard evidence from SH, a former employee with the company. SH commenced working for the company in December 2002 and provided the company with a CV. This CV showed SH’s date of birth. At the age of 65 SH was working a 5 day week. She was approached by JM Junior who informed her that things were not good within the company and he asked her if she was thinking of retiring soon to which she replied that she was not. He told her that it was a requirement of the company.

The following week SH approached JM Senior and reminded him that one of the conditions raised in her recruitment interview was that she would continue to work past the age of 65. He asked her if she had this information in writing. She was very upset by this and told him that he would have to make her redundant.

SH was given reduced hours of work amounting to a 3 day week before the company moved the accounting responsibilities to Wexford.

Determination

Based on the evidence adduced at the hearing, the Tribunal finds that the claimant was unfairly dismissed on the basis of age grounds and in the circumstances pertaining to this case award the claimant €3,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The claimant was notified at a meeting on 26th May that his employment would end on 30th June 2010 but did not receive his full statutory entitlement of 8 weeks notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and accordingly the Tribunal awards the

claimant €1,620.00 (3 weeks pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

As there was no evidence adduced in respect of the claim under the Organisation of Working Time Act, 1997, this claim must fail for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)