

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD297/2010
MN271/2010

against

EMPLOYER

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. O. Madden BL

Members: Mr. D. Moore
Mr. F. Keoghan

heard this case in Dublin on 13 May 2011 and 23 September 2011

Representation:

Claimant(s):

Mr. Ross McMahon, David F McMahon & Company, Solicitors,
Prosperity Chambers, 5/6 Upper O'Connell Street, Dublin 1

Respondent(s):

Mr. Eamonn McCoy, IBEC,
Confederation House,
84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:-

It was alleged that the claimant, a healthcare adviser with the respondent, had been unfairly dismissed without adequate notice after an employment from 26 April 2001 to 5 August 2009.

Contesting the allegations, the respondent stated that the claimant had signed and accepted her contract of employment on 13 September 2001 in which she accepted that her normal retirement age was sixty-five. In the months leading to her sixty-fifth birthday (i.e. 5 August 2009) she was spoken to on a number of occasions to prepare her for retirement and to outline to her that her employment would be terminated on that date. She was retired on 5 August 2009. She sought to be retained past her normal retirement age but this was rejected.

Arguments on behalf of the claimant

The applicant commenced employment with the employer on 26 April 2001. By letter dated 17 July 2009 the employer purported to terminate the applicant's contract of employment as of the date of her 65th birthday on 5 August 2009.

The letter confirmed that the employer was seeking to rely on a compulsory retirement age of 65.

The applicant accepts that her contract of employment states that the "Normal" retirement age as stated in her contract of employment is 65 years of age.

"Your normal retirement age is 65."

The applicant's position is that her employer had not applied this as a compulsory retirement to all of its staff and in many instances permitted members of staff to remain in employment long after their 65th birthday. It was not as a matter of fact the "Normal" retirement age of the same employer in similar employment.

In their letter of the 17th July 2009 the employer indicates that the retirement age for "all colleagues is 65". The applicant gave evidence that this is factually inaccurate.

The question then arises if indeed the proposed "normal" age of retirement is not in fact the normal age and the employer applies a discretion or makes an assessment as to whether it should be applied in a given case can the employer unilaterally, and without following fair procedures, impose same. The applicant submits that the employer is not entitled to do so without such proper consultation with the employee and allowing the employee a fair chance to make his or her own submissions in response to the employer's proposals. The employer is under an obligation to furnish valid, objective and proportionate reasons to employees if it decides to impose such a purported compulsory retirement age in the current circumstances.

There has been no suggestion from the employer that the employee was or would be any less

able to carry out her appointed role after her 65th birthday.

The applicant draws the Tribunal's attention to the fact that the employer only furnished formal notice of the purported termination on the 17th July 2009. Pursuant to the Minimum Notice and Terms of Employment Act, 1973 (as Amended) the employee was entitled to 4 weeks' notice of the termination. Given the difficulties in establishing whether or not the retirement age is compulsory the employer must furnish notification to the employee of its intention to impose such a term. It is unreasonable for the employer to rely on the "Normal" retirement age as stated in the contract in circumstances where there is any doubt as to whether or not it will be imposed.

The question must also be asked, if it is alleged that notice was not required, why then did the employer deem it necessary to furnish same on the 17th July 2009?

The earliest date which the employee could be dismissed was the 14th August 2009 some 9 days after her 65th birthday. Given the fact that the employee was entitled as a matter of law to remain in employment up to this date the employer was and is not entitled to insist on her dismissal without providing adequate objective and proportionate reasons to the employee and allowing her a right of reply, the dismissal was unfair.

S. 6 (2) (e) prohibits dismissal which results wholly or mainly from the age of the employee.

The employee made attempts through her union to reach a reasonable accommodation with the employer but the parties were unable to resolve the matter.

Submissions

Notice

The Applicant commenced employment with the Respondent on the 26th April 2001 and would accordingly have been entitled to 4 weeks' notice from the 17th of July 2009. The applicant's notice period expires on the 14th August 2009 some 9 days after her 65th birthday. The applicant is entitled to payment in lieu of same.

Unfair Dismissals

Ireland does not have a statutory retirement age. If no retirement age is provided for then there is no date at which the employee can be forced to retire.

S. 2 of the Unfair Dismissals Act, 1977 as amended states inter alia at sub-section (B):

an employee who is dismissed and who, on or before the date of his dismissal, had reached the normal retiring age for employees of the same employer in similar employment or who on that date was a person to whom by reason of his age the Redundancy Payments Acts, 1967 to 1973, did not apply,

Previously, the legislation excluded employees who were over the age at which they could claim a state pension (age 66). This has been amended to instead exclude persons who have reached the “normal” retirement age with the same employer.

After respondent witnesses and the claimant had given sworn testimony, the claimant’s representative submitted that it was clear that 17 July 2009 was the date on which it was certain that the claimant’s employment would end. Before that the claimant did not know. She did not have notice. The claimant could have retired and could have had more time to deal with it. If given six months’ notice the claimant could have put herself in a better position and would have been able to plan better.

The respondent’s representative stated that the Unfair Dismissals Legislation did not apply as the claimant had reached the “normal” retirement age with the Respondent. Furthermore the claimant had received a contract and a handbook consistent with what the normal retirement age was. The claimant had said that she might not have read the relevant wording. The claimant had had the benefit of union representation but no internal grievance had been raised. There was a discretion as to the normal retirement age but any flexibility was at the respondent’s discretion for business needs and not at the discretion of any employee. Though it was true that it had suited the respondent to keep on particular employees beyond their normal retirement this only occurred in specific cases and not very often. Most employees retired at the normal retirement age. The claimant had been a good employee but, unfortunately, did not have skills which the respondent, on the claimant’s retirement, could not replace with another employee.

Determination:

Having carefully considered the sworn testimony and caselaw, the Tribunal was satisfied, given the totality of all the evidence, in particular, the signed contract of employment and the content of the company handbook, that the claimant was correctly retired having reached the age of sixty-five. The Tribunal found no justifiable reason for a departure from that. Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Also, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails because the Tribunal did not find the respondent to have breached the said legislation.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)