

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *Claimant*

RP2159/2010

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: Ms. M. Levey B.L.

Members: Mr. D. Winston

Mr. J. Dorney

heard this claim at Dublin on 3rd January 2012

Representation:

Claimant : Mr James Aitken, James D Aitken & Co, Solicitors, 107 Trees Road, Mount Merrion, Co Dublin

Respondent : Mr Pdraig Lankford, Maxwells, Solicitors, 19 Herbert Place, Dublin 2

And

Ms Kerry Molyneaux, IBEC, Confederation House,  
84/86 Lower Baggot Street, Dublin 2

### **Preliminary Issue**

The representative for the claimant told the Tribunal that the claimant was made redundant in February 2010 but re-employed in April 2010 to cover maternity leave in another department of the respondent. The representative stated that the claimant was unfairly selected for redundancy and the position was later advertised and filled by the respondent. Although the claimant is currently employed by the respondent she does not have security of tenure and is only on a fixed term contract since August 2010. The redundancy was decided in order to avoid a contract of indefinite duration. The claimant's position was that she was entitled to a contract of indefinite duration.

The representative for the respondent told the Tribunal that due to the moratorium on recruitment in the Public Service in place the respondent could not give a contract of indefinite duration at this time. The Tribunal were told that the claimant is currently employed by the respondent and has a three year fixed-term contract which commenced in August 2010. The representative said that the respondent did everything to ensure the claimant would continue to be employed by them.

## **Background:**

1. The claimant is a lecturer in St Patrick's College of Education. She was employed on a series of fixed-term contracts between 6<sup>th</sup> February 2005 and 31<sup>st</sup> August 2009. The aggregate duration of these contracts exceeded four years which she maintained entitled her to a contract of indefinite duration under the Protection of Employees (Fixed Term Work Act) 2003. The claimant referred a complaint under this act to the Rights Commissioners on the 2<sup>nd</sup> March 2009.
2. Prior to this hearing, the college advertised 2 posts in the press on the 20<sup>th</sup> March 2009. The claimant was eligible to apply for one of these posts in Special Education but wasn't ranked high enough to be successful in her application. The second post was required to be filled on a seconded basis only. The claimant was not eligible to apply for this post as she was not a serving teacher.
3. By letter dated 26<sup>th</sup> March 2009 the claimant's solicitors requested, inter alia, that the respondent desist from advertising or seeking to fill the claimants post pending the determination of the Rights Commissioner.
4. At a hearing on the 27<sup>th</sup> October 2009 the Rights Commissioner found that under the aforementioned Act the claimant was entitled to a contract of indefinite duration with effect from the 7<sup>th</sup> February 2009. This decision was in accordance with section 9(4) of the Act.
5. The claimant was not provided then or since with a contract of indefinite duration. She was in fact made redundant with effect from 26<sup>th</sup> February 2010 and received the statutory redundancy entitlements.
6. Subsequent to being made redundant the claimant was provided with a fixed term contract covering another employee's maternity leave. This contract was to commence on the 19<sup>th</sup> April 2010 and finish when the permanent lecturer returned from maternity leave.
7. While undertaking the maternity leave contract the claimant applied for and was successful in obtaining a fixed term contract commencing on the 1<sup>st</sup> September 2010 and terminating on the 31<sup>st</sup> August 2013.

## **Claimant's case**

The claimant contends that by virtue of R.C. finding she is entitled to a contract of indefinite duration, in effect permanency, and that by being made redundant she was in effect unfairly dismissed. This is so by law, and by the fact that the college authorities accepted the R.C. finding. The claimant further points out that on the 20<sup>th</sup> March 2009 two permanent posts became available, one filled by way of public advertisement and one to be filled by the

secondment of an existing teacher.

The claimant applied for and was unsuccessful in obtaining the advertised post (she was placed third). She was prevented from being appointed to the seconded post (ineligible to apply) on the instruction to the college authorities from the Department of Education as she was not a seconded teacher. The claimant, however, contends that she was in effect permanent (by virtue of the R.C. finding) and therefore had an entitlement to the seconded post as de facto she could be seconded into the post without a change of status (as could a seconded teacher).

The claimant accepts that there is no appreciable loss of earnings to her over the period in question. The main issue for her is to establish her right to a permanent position and that she was improperly selected for redundancy and so unfairly dismissed.

### **Respondent's case**

The respondent outlined the efforts they made to keep the claimant in work while maintaining that she was fairly made redundant. They point out that this claim was not under the Protection of Employees (Fixed Term Work Act) 2003 but rather under the Unfair Dismissals Act. They further state that while accepting the R.C. finding they hold that there were objective grounds in denying the claimant permanency. The objective ground is that no suitable vacancy existed at that time due to the denial of the funding from the Department of Education for the post, and the Department's instructions on the filling of those posts which did exist.

### **Determination**

The respondent maintains that the claimant did not have a right to a CID on the 7<sup>th</sup> February 2009 and that they had a right to maintain their position that they had a case to present to the rights commissioner for adjudication. The rights commissioner's decision was not issued until 27<sup>th</sup> October 2009 and there was then had a 6 week period to consider whether or not to appeal. They say that at that stage the recruitment process for the permanent post advertised in March had concluded and the successful candidate had been in the role for a number of months.

The respondent acknowledges that at the time of her redundancy the claimant was deemed to hold a contract of indefinite duration by virtue of the Rights Commissioner's decision. However they maintain that while that was the case, there was no role for the claimant to fulfil at that time and accordingly she was made redundant.

It seems to the tribunal that the respondent's position is somewhat disingenuous in this regard. In March the respondents were asked to await the finding of the Rights Commissioner before appointing people to the relevant posts. They decided to proceed. If the respondent was unaware of what the claimant's rights were under her fixed term contracts, the prudent and fair course of action to take would have been to await the decision before deciding to appoint another person to the permanent position. If dissatisfied with the outcome they had the option to appeal that and they could have held the new appointment in abeyance or filled it temporarily. Instead they hired someone else on a permanent basis and then sought to rely on the defence that there was no role available for the claimant and made her redundant.

Thus on the one hand they rely on the fact that there was a case pending before the Rights Commissioner to support their contention that the claimant had *not* a CID from the 7<sup>th</sup> February 2009. Then, subsequent to the decision of the Rights Commissioners, having appointed somebody to the vacant post in the interim, they now seek to rely on their own actions in filling the post to state that while she *did* have a CID from 7 February 2009 there is now no vacancy for her. It seems to the tribunal that the respondents, by their actions, were seeking to circumvent the application of the Act.

The respondents say that they actively sought funding from the Department for a post for the claimant after the Rights Commissioners decision was received but this was declined as all contract and seconded posts had been suppressed. It is insufficient for the respondent to say that they were prevented from employing the claimant in a permanent capacity due to the failure of the Department of Education to provide funding. It is well established that the legal entitlements of a claimant are not subject to the dictates of a third party i.e. economic reasons and lack of funding is not an objective justification in accordance with the 2003 Act. If the legislature intended cost and/or funding to be a relevant consideration same would have been inserted into the Act of 2003. Had the respondent stayed its hand and awaited the outcome of the Rights Commissioners recommendation these circumstances would not prevail.

Accordingly the Tribunal therefore finds that

- a. The claimant was unfairly dismissed because she was unfairly selected for redundancy.
- b. Given the unfair dismissal the claimant retains her right to the contract of indefinite duration as per the R.C. finding.
- c. That she be re-engaged on a contract of indefinite duration in her current position with effect from the date of this determination.

Claims under the Unfair Dismissals Acts, 1977 to 2007 and Redundancy Payments Acts, 1967 to 2007 being mutually exclusive the claim under the Redundancy Payments Acts, 1967 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)