

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE

CASE NO.  
RP1572/2011  
MN1293/2011

against

EMPLOYER

under

### REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony BL

Members: Mr. P. Casey  
Mr. O. Wills

heard this appeal in Tralee on 20th April 2012

Representation:  
\_\_\_\_\_

Appellant(s):

Thomas J. O'Halloran, Solicitor, Upper Ashe Street, Tralee,  
Co Kerry

Respondent(s):

No legal representation

The decision of the Tribunal was as follows:-

The appellant, who worked in the respondent's TV shop, claimed that her employment, which commenced in December 1971, ended without notice by reason of redundancy on 23 February 2011. Her gross weekly pay was €216.25.

### Summary of Evidence

The respondent's case was that he kept his business open, despite the fact that it had not been profitable for some twenty years to enable him to avoid having to make the appellant's post redundant before she reached retirement age on her 66<sup>th</sup> birthday. The business had been winding down for the previous 10 years. Other employees had left of their own accord. The

appellant was his only employee in the end and he had wanted to keep her in employment until she could retire with dignity. His position was that it was custom and practice to retire on reaching state pension age. It was not untoward of him to present the appellant with a retirement card and a goodwill payment of €2,500.00 on the day of her sixty-sixth birthday. The appellant was not replaced in the employment.

It was appellant's position that she had never, throughout the course of her employment with the respondent, received anything in writing to specify a particular retirement date for her. Nor had the respondent put her on notice in advance of her 66<sup>th</sup> birthday that he would be terminating her employment when she reached her 66<sup>th</sup> birthday. The appellant had an operation in early February 2011 and during her resulting absence from work the respondent visited her and left her a card. The appellant believed that it was a get well card but it was a retirement card with a cheque for of €2,500.00.

### **Determination:**

The claimant did not have a written contract of employment. There was no written or verbal agreement between the parties on the appellant's retirement age. Indeed the sentiment expressed by the respondent in the retirement card given to the appellant: “[W]e both know ...our time for trading is over and I believe that it is time to acknowledge our current frailties and gracefully wind down. I think the time is right for you to retire now and concentrate on your recovery without sharing my problem” support a finding that there was no agreement or understanding between the parties that a retirement age of 66 years applied in the employment. There is no national legislation setting down a mandatory retirement age.

In such cases as this a contract arises by conduct. The respondent sought to rely on *McCarthy v H.S.E.* [2010] IEHC 75 to imply a term on compulsory retirement. This case involved a radiographer working in the public service who had not been furnished with a contract of employment. In that case Hedigan J implied a term providing for a retirement age of 65 years as a term of applicant's employment with the H.S.E on the basis *inter alia* that she was “a highly intelligent woman” who was legally qualified and that it was difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. In the instant case the appellant is employed in the private sector. The respondent did not adduce any evidence of “the ubiquity of a (specific and definite) retirement age’ in employments such as that of the claimant. Thus it is not open to the Tribunal to imply a term on the basis of *the officious bystander test*. Neither was there any evidence adduced to demonstrate that there was a custom and practice in the particular employment or trade that employees retire on reaching 66 years of age. For the above reasons the Tribunal is satisfied that there was no term, written or otherwise, in the contract/employment that the appellant was subject to a retirement age of 66 years.

The Tribunal is satisfied that a redundancy situation existed in the respondent's business in February 2011 and that the appellant was dismissed by reason of redundancy. The Tribunal awards the appellant a lump sum payment, under the Redundancy Payments Acts, 1967 to 2007, based on the following details:

Date of birth:	23 February 1945
Date of commencement:	15 December 1971
Date of termination:	23 February 2011

Gross weekly pay: €216.25

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Allowing the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Tribunal awards the appellant the sum of €1,730.00 (this amount being equivalent to eight weeks' gross pay at €216.25 per week).

**Note:** The Tribunal notes that the respondent made a goodwill payment in the sum of €2,500.00 to the appellant on the termination of her employment.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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