

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.
RP798/2010

- appellant

against

EMPLOYER

- *first named respondent*

EMPLOYER

- *second named respondent*

EMPLOYER

- *third named respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this appeal at Letterkenny on 31st March 2011

Representation:

Appellant(s) : Mr. Paddy Hannigan, Citizens Information Centre, Public Services Centre,
Blaney Road, Letterkenny, Co Donegal

Respondent(s) : Mr Denis O'Mahony, Vp McMullin, Solicitors, Port Road, Letterkenny, Co Donegal
- for first named respondent

Ms. Kate McMahon, Coffey & McMahon, Solicitors, 223, The Capel Building,
Mary's Abbey, Dublin 7

- for second named respondent

Mr. John Barry, Management Support Services (Ireland) Limited, The Courtyard,
Hill Street, Dublin 1

- for third named respondent

The decision of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. He was employed by the third named respondent to carry administration work and uphold the upkeep of the premises as well as assisting his colleague. In 2008 he received a letter from the HR department requesting a date for his retirement. He replied stating that he would prefer to remain working until the contract was up or if he had to go before that he would be happy with the end of July 2009. He stated that no one had mentioned previously that the age of retirement was 65 years. He also spoke to the Regional Manager (TC) on one occasion and retirement had been mentioned. He told him he did not want to retire and felt he was being "forced out".

On cross-examination he stated that he had been very happy working for the third named respondent and felt he had been treated very fairly in the past. When asked he stated that he had signed his

contract of employment and the company handbook but was unaware of the retirement age stated in it. He said that he might have told TC that he knew he would have to retire at some stage. When put to him he stated that he could not recall receiving the letter dated January 6th 2009 regarding a date for his impending retirement.

Respondent's Case:

The Regional Manager for the third named respondent gave evidence. He explained that he overseen all the depots in the North West and visited each premises once a month. At an operations meeting the issues of retirements arose and the appellant name as mentioned.

In December 2008 he called to the premises the appellant was employed. He spoke to the appellant and the subject of his retirement arose. He told the appellant that the HR department would be touch with him. The HR department had informed him that they would be in touch with the claimant concerning attending a retirement course. He told the Tribunal that the appellant had spoken very highly of working for the third named respondent.

On cross-examination he said that the appellant had said that he would prefer to remain working but knew he would have to retire at some point in time. He stated that he could not recall the appellant stating that he was being forced to leave his employment.

The third named respondent's representative (JB) gave evidence. He explained that the contract for car testing was for a 10 year period. The third named respondents contract was to expire in January 2010 and they had not been successful acquiring the next 10-year contract. It had been won by the first named respondent. Ongoing negotiations took place through 2009 and it was decided the staff and equipment would transfer to the first named respondent from January 4th 2010. However, the first named respondent later requested it to be brought forward. At midnight December 23rd 2009 the first named respondent took over all staff and equipment. As part of the agreement the third named respondent paid all staff until the end of the year but these payments were reflected in the cost of the equipment sold to the first named respondent.

Determination:

The initial issue in this case was to determine who was the employer on the date of the appellant's dismissal. It is common case that the date of dismissal was December 31st 2009.

The third named respondent argued that a transfer of undertakings took place and evidence was given by the third named respondent's representative (JB) that it had taken place at midnight on December 23rd 2009. The Transfer of Undertakings regulations state that the transfers, rites and obligations arising from a contract of employment existing on the date of a transfer shall by reason of such a transfer be transferred to the transferee (see Section 4.1). This is an automatic transfer and does not require any input from the employee. (Section case law - Symantec -v- Leddy - High Court - Edwards J. 2009).

The employee retains all existing rights under employment legislation, their contract of employment and custom and practice. Based on the uncontested evidence by JB the Tribunal determine that as of the date of dismissal a transfer of undertakings had already taken place and the employer as of the date of dismissal was first named respondent.

It was clear from the evidence that there was a provision in the third named respondent's employee handbook that formed part of the contract entered into by the appellant on August 28th 2002

stating that the company's normal retirement age is 65 years. The appellant reached that age on September 7th 2003. However it appears that no effort was made by third named respondent to enforce that term of the contract until it was apparently noticed in November 2008 and indeed the company agreed to defer his retirement until December 2009 when he had reached the age of 71 years.

The Tribunal felt all the witnesses gave creditable evidence and felt it should have been clear the appellant was reluctant to retire but all accepted the appellant did not make any formal complaint about being asked to retire. What the Tribunal have to decide is the third named respondent's failure to enforce the retirement age set out in the company handbook amounts to waiver of this condition in respect of the appellant.

The Tribunal find that the third named respondent was not entitled to rely on this condition having unconditionally allowed the appellant to continue in work for many years past retirement age. Finally the Tribunal has to find whether the appellant's dismissal was by way of redundancy. Based on the evidence heard the appellant's position was not made redundant because the work continued to be done and therefore the Tribunal find the appellant was not dismissed by reason of redundancy. The appeal under the Redundancy Payments Acts, 1967 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)