

Unfair Dismissal/Retirement Age/New Contract*

An interesting case arose in UDD1862 being a case of Kirkwood Enterprises Limited and Pearse O'Brien. The employee in this case it was accepted worked under a contract stating that the retirement age was 65 but the company reserved the option to offer time limited extensions to the contract beyond the 65th birthday. The employee was retired at the end of the month of his 66th Birthday but was offered a fixed term contract commencing on 1 January 2017. The complainant complained that he was unfairly dismissed. The employer contended that he had not been dismissed.

It was accepted that the contract was extended to his 66th birthday and subsequently received a contract for a one-year fixed term.

The Court pointed out that Section 1 of the Unfair Dismissals Act defines termination as being,

“Termination by the employer of the employee’s contract of employment with or without notice.”

The Court pointed out that Section 6 of the Minimum Notice and Terms of Employment Act provided that the continuous service of an Employee shall not be broken by the dismissal of the employee by the employer followed by the immediate re-employment of the employee. The Court pointed out that the manner that the employer approached the retirement of the Complainant was less than satisfactory. The Court held that the employee had available to him a fixed term contract for one year commencing the next day on 1st January 2017 offering the same basic pay and a similar role to the one he had. They pointed out that it was his choice not to take up that role. They stated that for a dismissal to occur the employment relationship had to terminate. The Court stated that while in this case the employment relationship may have changed it did not terminate and therefore no dismissal occurred.

This case is extremely interesting for those involved in employment law. The exact term of the new contract was not set out in the Decision. If it was a fixed term contract which provided, for example, that the provisions of the Unfair Dismissal Acts would not apply merely by the expiration of the fixed term contract then clearly there

would have been a significant change in the contractual terms. If such a clause was there then the decision of the Court does leave open potential opportunities for employers.

It would now appear probably advisable in such cases that not only is an unfair dismissal claim brought but also a constructive dismissal claim. If a contract does not have provision, for example, that it can expire simply by a fixed term expiring and the employer then proposes to provide a contract which would expire then in those circumstances the employer may be able to rely on the contract test as in the case of *Higgins v. Donnelly Mirrors Limited* 1985 IRLR240.

The alternative in these cases is to bring an equality claim.

This is an important Decision. It would have been helpful if the decision had set out whether this was a contract being the subsequent contract as one that had the provision which would have been materially different namely that the Unfair Dismissals Act would not apply merely by the fixed term contract coming to an end. If such a clause was in the contract then the employee is in a very difficult position that they effectively can only get the one-year extension as when it extends and when it finishes the employee will be dismissed under a provision where the employer has a full Defence. The alternative is of course they need to accept that contract then at the end of that term and bring not an unfair dismissal case but an equality claim based on age.

As we said this was an important case and it is probably an issue which is going to arise into the future.

****Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.***

*****In contentious cases, a solicitor may not charge fees as a proportion or percentage of any award or settlement.***