

## EMPLOYMENT APPEALS TRIBUNAL

### Claims Of:

Employee

RP556/2005

### Case No.

UD1192/2005

MN897/2005

### Against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. P. O'Leary  
Mr D. McEvoy

heard this claim at Cork on 27th September 2006 and 14th November 2006

### **Representation:**

Claimant: Mr. Joseph Cuddigan, Joseph S. Cuddigan & Co., Solicitors,  
30-31 Washington Street, Cork City

Respondent:  
HR Manager

### **The determination of the Tribunal was as follows:**

This being a case of constructive dismissal it then fell to the claimant to make his case.

### **Background:**

The respondent provides security services to companies. The claimant was based on a customer's site in Ringaskiddy for the five years of his employment with the respondent.

### **Claimant's Case:**

The claimant worked two days and two nights a week on site. He was based at the reception area and his duties included monitoring internal and external security cameras, answering the telephone,

maintaining various logs and distributing keys. The claimant was never absent due to illness and he never received a letter of reprimand. He always arrived to work forty minutes before his starting time.

On August 16<sup>th</sup> 2005 the claimant received a telephone call from his mother, who was feeling unwell. He received the call on the main phone in reception. Usually a light on this phone would alert the claimant to any other incoming calls while he was speaking on the phone. This light had been broken for about four to five weeks and his supervisor had sent an email highlighting this.

During the time the claimant was speaking to his mother the Health, Safety & Security Manager (hereafter called HSS) for the customer company was attempting to phone in. The claimant was unaware of this at the time. When the claimant's conversation with his mother was finished HSS entered reception and asked if the claimant had been on the phone. The claimant said he had. HSS asked if it was a personal call and the claimant replied yes he had been speaking to his mother. The claimant told HSS the display light on the phone was not working. HSS told the claimant he knew that.

HSS spoke to the claimant's supervisor. The supervisor told the claimant he was in trouble. He felt his supervisor was sympathetic to him. She asked him to sign a memo and he did. She mentioned there was going to be a meeting the following day between the respondent and the customer company about the incident.

The following day (August 17<sup>th</sup> 2005) the claimant attended a meeting with the Customer Services Manager (hereafter called CSM). He was sympathetic to the claimant. He told the claimant there was not that much work at the moment. CSM told the claimant the company would be making him unemployed. If a suitable position arose there was a possibility the claimant would be employed, possibly part-time. CSM was very vague. The claimant presumed he would have employment until a replacement was found. The claimant was not offered a position on an alternative customer site.

The claimant returned to work that night. He felt very humiliated. He did not speak to anyone, as the matter was confidential. It was a sad end after working in the company five years and he was upset that night in work.

On August 18<sup>th</sup> 2005 the claimant was due to work again but felt he could not. He telephoned CSM. CSM told the claimant not to worry he had spoken with HSS who thought he had been hasty and the claimant had his job back. The claimant wanted to phone HSS to thank him. CSM told the claimant he had misunderstood. The claimant was devastated and could not understand how he had misunderstood. CSM said HSS was going to keep the claimant but ease him out gradually. The claimant was very hurt. Both he and CSM were "hot under the collar" and the claimant said he would not be going into work that evening. CSM told him to send in a letter of resignation. The claimant did not. The claimant spoke with a SIPTU representative but did not find this helpful.

In cross-examination it was put to the claimant he had utilised the phone for thirty minutes. The claimant disputed the call lasted for thirty minutes. He accepted it was ingrained in security officers not to use customer's property for private use. The claimant was very responsible about this but he said there are certain situations where a bit of understanding is needed. Personal use of the phone was not acceptable but he said there are emergency situations.

When the claimant met with the CSM on August 17<sup>th</sup> 2005 he agreed with CSM that the customer

was not happy. He told CSM that HSS had commended him only a few weeks beforehand for his work.

Prior to the incident on August 16<sup>th</sup> 2005 the claimant had approached the company about part time work if he began to study for a Masters in Theology. During the meeting on August 17<sup>th</sup> 2005 CSM did not say anything definite about work in an alternative site. The claimant did not say to CSM he did not want to return to work. The claimant thought at that time he could return. It was not until he actually went back that he realised it was very difficult. The claimant did not request his P-45. He did not know why CSM looked for a letter of resignation when he spoke to him on the phone on August 18<sup>th</sup> 2005.

The meeting with the SIPTU representative disappointed the claimant. The meeting was rushed and the claimant had to explain his situation quickly. The SIPTU representative did not take any notes. The claimant did not hear from the representative after this meeting. The claimant phoned him several times. The SIPTU representative told him the Area Operations Manager (hereafter called AOM) was willing to have a discussion and accommodate him. The SIPTU representative did not elaborate on this. It was up to the claimant whether or not he wanted to meet with AOM.

The claimant did not receive a P-45 from the company. It was put to the claimant he contacted the SIPTU representative to assist him in getting his P-45 not to take a grievance. The claimant said he asked the SIPTU representative to speak to the company about the incident but also about his P-45.

It was put to the claimant that the company had offered an alternative work site to the claimant with a lead time for training, the claimant refused this and requested his P-45 and involved the union to get this. The claimant did not accept this. The claimant met with the SIPTU representative to raise a grievance and his P-45 was mentioned. The claimant was sympathetic to the company but he thought the situation was handled badly. He accepted he had not requested a copy of the appeals or grievance procedure but he had contacted the SIPTU representative. After his dealings with CSM he felt effectively misled into believing he had his job back. He did not approach the AOM or the Human Resources Manager.

Answering questions from the Tribunal the claimant confirmed he had not received a letter of disciplinary action. Everything unravelled from his telephone conversation with CSM on August 17<sup>th</sup> 2005.

The claimant's position was full time and permanent. The telephone call from his mother was received during his day shift. There was a main telephonist in the client company but sometimes the claimant managed the phones. His mother phoned him on the company's security desk. This phone was allocated to the company from the customer. The claimant was unsure but thought the telephone call with his mother lasted approximately fifteen minutes. The claimant was obliged to answer the phone at the desk. Alternative assignments were not offered to the claimant.

### **Respondent's Case:**

The Area Operations Manager (hereafter called AOM) is responsible for the company in Connaught and Munster. He has a certain amount of human resources duties and also works on service level agreements with customers. He has overall responsibility for employees but does not have daily interaction with them. He visits each customer site about once in six weeks. The company tries to cross train people. The company's job is to provide the service levels their

customer wants.

It is unusual that an employee would be based on one site for five years. When the company won the contract for the customer's site it was their goal to cross train everyone. AOM had team meetings and would have met the claimant. The claimant would have known AOM was the overall manager. The claimant did not approach AOM about the incident on August 16<sup>th</sup> 2005. AOM heard what happened from the claimant's supervisor. The claimant had been involved in two or three other small incidents. AOM asked the supervisor to counsel the claimant on the matter. The service level agreement was very important to the company. There was a bonus scheme in operation. It was the supervisor's job to meet with the customer regarding service level agreements. AOM thought this was why she discussed the incident involving the claimant with him. It was not a disciplinary meeting as such he just asked the supervisor to counsel the claimant about the incident.

The procedure is the customer makes the CSM aware if they have a complaint. It is brought to the attention of the site supervisor. The complaint can be contained within the site as with the claimant. If it is a disciplinary matter it is reverted to the CSM. It may be escalated from there to AOM. The appeals procedure follows. Some clients can be difficult to deal with. In this case AOM was a little surprised the customer wanted the claimant removed from the site. When AOM became aware of the situation involving the claimant he passed it onto CSM and asked him to have a meeting with the claimant. The next input came from the SIPTU representative. AOM was not approached about a grievance.

In cross-examination AOM was unsure when he was informed of the incident by the claimant's supervisor. He did not know why the supervisor contacted him about the incident. He did not ask the supervisor why she had not spoken to CSM. It was put to AOM that as the matter was passed down the line to CSM from him instead of up the line that it put an importance on it. AOM agreed. It was put to AOM there was a misunderstanding surrounding the end of the claimant's employment. AOM accepted this. It was put to AOM that legal representation for the claimant had sent letters on August 30<sup>th</sup> and September 15<sup>th</sup> 2005 in order to get clarification on the claimant's situation but he received no response to either letter. AOM did not receive these letters.

AOM does not have access to the claimant's file. It was put to the witness he had mentioned small incidents involving the claimant and was asked why he had not accessed the claimant's personnel file. AOM stated the claimant's personnel file was held in Dublin. He accepted it was not impossible to have the file sent to him.

The claimant was a good employee. AOM was not aware the claimant had received a letter of recommendation from an employee of the company. The recommendation was entered into evidence. It contained the customer's logo but was signed by an employee of the company. AOM said he was not happy an employee had used the customer's logo for the purposes of the recommendation. AOM accepted it was fair to say there was a breakdown in communication in the company, as the claimant's representative had not received a response from the company.

AOM said it was over a year since the claimant's file was in the Cork office. It was put to AOM he would have seen the letters from the claimant's solicitor on the claimant's personnel file. AOM said an employee's file is sent to Dublin when employment is terminated. He did not know when the claimant's file was sent to Dublin but it was shortly after he had a conversation with the SIPTU representative. AOM did not take notes of his meeting with the SIPTU member. The SIPTU

representative thought it was best if the claimant and the company parted. AOM was asked by him to write a letter to facilitate the claimant and in return the claimant would write a letter of resignation. AOM did not inform the company he broke regulations.

It was put to AOM the claimant's supervisor had passed over her line manager who is the CSM. AOM said the supervisor would contact him if she could not contact CSM. It was put to AOM it was undermining for CSM to be bypassed by the supervisor, as CSM was responsible for Cork only while AOM is responsible for all of Connaught and Munster. AOM agreed it was undermining.

Answering questions from the Tribunal AOM said he asked the supervisor to counsel the claimant about his future behaviour on the telephone. If the supervisor passed along a complaint from HSS then the company had to pander to the customer. AOM did not speak to anyone more senior than HSS from the customer company.

The supervisor of security at the client company verified that HSS came to her and made the complaint about the claimant being on the phone. She raised the matter with AOM as the client wanted the matter dealt with as soon as possible.

In cross-examination she agreed that on one occasion prior to the incident she mentioned to the claimant that she would be taking maternity leave for three months and would he be interested in taking up her position in her absence.

The claimant's supervisor at the client company gave the claimant a personal reference and printed it on client company headed paper. Management personnel would not be aware that he wrote the reference. The claimant contacted him to say he was gone from the respondent and he was applying for another job. The claimant explained to him that he was on the phone to his mother who was ill and that HSS wanted to use the phone. HSS contacted CSM and wanted the claimant off the site. The claimant said that he was not going to do the night shift and if HSS wanted him off the site he would go there and then. Witness advised him that he would be "mad" to throw away his job.

In answer to questions from Tribunal members witness said he was not aware that the call in question was an incoming call.

The branch organiser of SIPTU looked after the claimant as a member of the union. The claimant told him on 18<sup>th</sup> August 2005 about the phone call and that he was to be moved off the site. Having contacted the line manager he was told that the claimant was to be moved to a site near his home. The claimant did not revert to him and did not ask him to engage in internal procedures. As far as he is concerned the client company "call the tune". His task was to ensure that the claimant was kept in employment.

In cross-examination he said he was shocked at the allegation that he was party to a false representation to the Department of Social Welfare stating that there was no suitable work available for the claimant.

The CSM met with the claimant after the phone call incident and told him that he would have to be moved to another site. They discussed one or two possible sites that could be coming up one of which was part-time on a Saturday and Sunday. The claimant said that this would suit, as he would be studying during the week. As far as he was concerned the claimant was then supposed to work his shift the following night and was to be on overtime on the Saturday night. The next day he

received a phone call from the claimant stating that he would not cover the overtime shift the following day, as he could not work where he was not wanted. He told the claimant that he would have a problem getting someone else to cover at short notice and would he see that shift through. The claimant's response was that his mind was made up and he requested a letter to say he was fired but witness told him he could not accede to this request. The claimant then asked if he could issue a letter so that he could claim Unemployment Benefit and he refused as he had work for him.

In cross-examination he said that while the claimant had to move from the site but not immediately. He owed the claimant the courtesy of hearing his side of the story.

**Determination:**

The respondent totally disagreed with the removal of the claimant from the site and yet they did nothing to persuade the client to do anything in the circumstances. Despite the nature of the offence the client was prepared to let the claimant stay on until a replacement was found.

The Tribunal finds that the claimant was constructively dismissed and award him the sum of €7,956.00 under the Unfair Dismissals Acts, 1977 to 2001. The amount of award is based on figures agreed during the hearing course of the hearing. The Tribunal is surprised to note that on cessation the claimant was not issued with a P.45 and at the date of hearing it was still not issued.

The claim under the Redundancy Payments Acts, 1967 to 2003 was withdrawn during hearing and thus was formally dismissed by the Tribunal.

As this was a case of constructive dismissal there is no entitlement to payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

