

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

UD73/2006

MN39/2006

against
Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Martin B.L.

Members: Mr M. Murphy
Mr O. Nulty

heard this claim at Drogheda on 28th November 2006
and 22nd January 2007

Representation:

Claimant(s) : Mr. Shane Coyle, Branigan & Matthews, Solicitors, 33 Laurence Street,
Drogheda, Co. Louth

Respondent(s) : Mr. John Barry, Management Support Services (Irl) Limited,
The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

The Tribunal heard evidence from the claimant and from the respondent's Managing Director, Contracts Manager and Foreman. In addition it received submissions from both representatives.

These matters are set out in summerised narrative form as follows:

The claimant commenced employment with the respondent in March 2004 as a crane driver. Some time thereafter the respondent purchased a mobile crane, which was capable of being driven by road from site to site. The claimant was able to operate this mobile crane on a site but did not possess a "C" licence enabling him to drive this crane on the public roadway, but this was not an issue in itself. The claimant alleged that in December 2004 he tendered his resignation, in writing, unless the respondent increased his weekly wage from €550 per week to €750 per week. He maintained that while at a celebration, for the birth of a child of the Managing Director, in a pub in Ardee the Managing Director agreed to pay him what he requested, but subsequently only increased his wage to €650 per week. The Managing Director maintained that the claimant tendered his resignation at this time, but did so verbally and no trace could be found of such a letter of

resignation. He also mentioned that his child had been born in September 2004 and not December.

The claimant maintained that over the following months he asked several times about the extra €100 per week that had been agreed, just to be told that it was being looked into. Being unhappy with this situation the claimant tendered his resignation by letter dated 14th June 2005, the notice to expire on 14th July 2005 the date on which he was due to take two weeks holiday. This letter, which made no reference to either an outstanding or further pay increase, contained an offer from the claimant to stay on until the respondent found a replacement for him, provided they let him know before he went on holidays. This offer was unconditional. The Managing Director maintained that this letter of resignation was a "bolt from the blue", that he had no discussions with the claimant leading up to its receipt and that he regarded it as a stunt to get a further pay increase. He could not tolerate being held up to ransom like this on an ongoing basis in the future and accordingly instructed the Contracts Manager (his sister-in-law) to seek a replacement for the claimant.

Prior to the expiry of the notice period on 14th July 2005, discussions took place between the claimant and the respondent's Foreman. The claimant maintains that at this stage he asked for €1,000 per week in order for him to stay on. The Foreman's recollection was he asked for €850 per week. Initially the Managing Director authorised him to offer the claimant €750 per week and when this was declined he was authorised to ask the claimant if he would stay on for €850 per week. The claimant's payslips confirm that as of 15th July 2005 his wage was increased from €650 to €850 per week. Nobody on behalf of the respondent advised the claimant that this was a temporary arrangement until such time as they found a replacement for him. The Tribunal was shown a letter from the respondent's Health and Safety Manager (now Contracts Manager) dated 22nd August 2005 for purposes of the claimant being facilitated with an early test date in order to get his "C" licence. It was maintained that this was furnished at the request of the claimant. After initially maintaining that he had been unable to sit the theory test the claimant recollected that he must have in fact done so as he had obtained a Provisional "C" licence.

On the 17th October 2005 the claimant maintains the Foreman approached him and said he wanted to speak to him. They went to the office, where in the presence of another person, he was told that the Managing Director was relying upon the letter of resignation from June 2005 and that he was being let go at the end of that week. The previous week he had been asked to demonstrate the crane to a person whom he was told was a prospective purchaser of such a crane. It transpired that this person was in fact his replacement. There was some contention between the parties as to who said what to whom and when they said it on the 17th and 18th October 2005 but this did not have any effect on the substantive matter of the case. The claimant did not finish out the week as he maintained he was too upset by the events to be in charge of a crane.

The claimant gave evidence of immediately seeking alternative employment with other crane firms but he being unsuccessful, as he did not have a "C" licence. He applied unsuccessfully for two other jobs. He did receive a job offer from a company in Strabane, Northern Ireland but they were buying a crane for delivery in February 2006. He decided to take up this offer, sold his house and moved back to Donegal. This job did not in fact materialise until May 2006 and in the interim he got just five weeks work. This job pays less than he had with the respondent and he calculated his gross loss up to 9th November 2006 at €63,954.75. and continuing from there on. His inability to gain comparable employment almost immediately was disputed by the respondent's Contracts Manager who outlined her difficulties in getting a replacement for the claimant, it in fact taking her from June to October 2005.

The claimant attributed his difficulties to not having a "C" licence, that situation was not as restrictive with his new employer in Northern Ireland but the pay was less. The parties agreed a figure of

€1,026 for the claimant's weekly wage. The Contracts Manager was unable to tell the Tribunal what was the wage of the claimant's replacement. She maintained that prior to receipt of his letter of resignation in June 2005, she was unaware that the claimant was looking for more money. Although she was actively looking for a replacement for him she only became aware on Monday 17th October 2005 that the Foreman was going to tell the claimant that he was no longer needed.

The respondent's representative submitted that the words spoken to the claimant by the Foreman ought to be seen in the context of the claimant's letter of resignation and his offer about staying on until a replacement was found for him. That accordingly the claimant's resignation remained operative and that the respondent was entitled to rely upon it for purposes of terminating his employment. He referred to the availability of employment in the booming construction industry and what he regarded as failure on the part of the respondent to reasonably mitigate his loss. Both parties agreed that if the situation arose that compensation would be the appropriate remedy in this case.

Determination:

The Tribunal fully understands the respondent Managing Director's assertion that they could not function with periodic threats of resignation if demands for pay increases were not met. However in the circumstances of this case the respondent's were not entitled to rely upon the claimant's letter of resignation in June 2005 for the purpose of terminating his employment the following October. The offer contained in the claimant's letter of resignation to work on until a replacement was found was unconditional. It certainly did not seek an increase in pay temporary or otherwise to cover such an eventuality. Accordingly the Foreman's words of "will you stay on for €850" cannot be reasonably seen in the context submitted by the respondent. Furthermore it was never put to the Foreman during the course of his evidence that his asking, "will you stay on for €850" was anything other than a permanent arrangement, the acceptance of which rendered the claimant's letter of resignation inoperative. Furthermore the respondent's Managing Director confirmed to the Tribunal that he did not advise the claimant that he was accepting his resignation with the pay increase being an interim measure pending finding his replacement and neither did he so instruct anybody else on his behalf to so advise the claimant. In the circumstances the Tribunal finds that the claimant was unfairly dismissed by the respondent. Taking all factors into account, actual loss to date, ongoing loss and what it regards as the claimant's less than proactive approach to mitigating his loss the Tribunal finds that € 26,300 is the appropriate level of compensation in this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)