

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD1173/2005

RP121/2007

MN886/2005
WT401/2005

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
REDUNDANCY PAYMENTS, ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C
Members: Mr J. Horan
Mr G. Lamon

heard this claim at Dublin on 13th March 2007

Representation:

Claimant: Mr. Michael Mc Namee BL instructed by Mr. Gerard Dunne Solicitor
O'Brien Dunne, Solicitors, 6 Upper Fitzwilliam Street, Dublin 2

Respondent: Mr. Alex White BL instructed by Ms Patricia Horgan Solicitor,
Dillon, Solicitors, 13 Main Street, Dundrum, Dublin 14

The determination of the Tribunal was as follows:

The claimant was a service engineer who worked on the premises of the respondent's customers. It was the practice for him to go directly from his home to call on customers, and, at the end of the day to drive home directly. He was paid for this travelling time, and because this was extra time and the start or end of a day, payment was at overtime rates.

The respondent decided to monitor the performance of its service engineers, and, as part of this exercise a private detective observed some of the engineers, who were photographed leaving their houses in the morning and arriving home in the evening. These photographs were time-stamped to

record when they were taken.

Discrepancies appeared between the times shown on the photographs and the time sheets filled in by the claimant. When he was confronted with the discrepancies he did not deny them nor give any explanation. He was suspended without pay until a second meeting a week later. Again he did not deny the facts nor offer an explanation, and he was dismissed. He wrote another letter seeking to 'appeal' that decision, but the third meeting was more in the nature of a plea in mitigation, based on his good past service record and his personal circumstances. After this third meeting his dismissal was confirmed.

His case before the Tribunal was that dismissal was disproportionate to his offence, having regard to all the circumstances, but he also challenged the bona fides of management, by arguing that the dismissal was really an attempt to get rid of him without having to pay him redundancy, or to get rid of him because management had some 'animus' against him because of his trade union involvement and other issues.

Having heard his evidence and the evidence of two managers we cannot accept his challenge to the bona fides of the management. We accept the evidence given by the managers as to their reasons, and, on the other hand the claimant's case on this aspect was internally inconsistent, if not contradictory, as he was also arguing that he was a highly productive engineer.

Time-sheets, like clock cards, are very important documents, which form the basis for payment of wages, and the Tribunal has always taken a serious view of deliberate falsification. We took into account his excellent past record, but we cannot find that dismissal was disproportionate. We must hold that the respondent has shown a "substantial ground justifying the dismissal" under the Act.

On the other hand the immediate action of management in suspending him without pay at the first meeting is something to which we must have regard. The usual practice, in most cases before the Tribunal, is for initial paid suspension pending investigation. Unpaid suspension is a penalty in itself.

In the present case the factual investigation was completed when he was confronted with the evidence, which he did not deny, and one of the respondent's witnesses stated in very direct terms that he did not see why he should have to pay him to "take a holiday" until the next meeting. Given his admission to falsifying time-sheets on which he was paid the witness said he should not have to pay him again for doing nothing. This does not take away from the fact that unpaid suspension is a penalty, and the subsequent dismissal was a double penalty.

Section 6 of the Act, as amended by the 1993 Act provides:

"Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so—

(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal."

In our view the imposition of a double penalty in this way is conduct of the employer to which we consider it "appropriate" to have regard under this provision, and notwithstanding the "substantial grounds" shown by the respondent, we therefore deem the dismissal unfair.

Both parties agree that re-instatement and re-engagement are not feasible in this case, and the redress we award is compensation.

Given that the respondent has shown “substantial grounds justifying dismissal, we do not consider compensation for full financial loss to be “just and equitable having regard to all the circumstances” (Section 7 of the 1977 Act). We must also have regard to the conduct of the employee under that section. We take into account also his challenge to the bona fides of the employer, which apart from being unfounded, seems quite inappropriate coming from someone who, on his own admission, has defrauded his employer.

For these reasons we consider a sum of €2,000.00, to be “just and equitable having regard to all the circumstances” and we award compensation in that amount under the Unfair Dismissals Acts, 1977 to 2001.

Other claims:

1. The Claimant was not dismissed because of redundancy so the claim under the Redundancy Payments, Acts, 1977 to 2001, fails.
2. The claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001 fails because we find Claimant was dismissed because of misconduct.
3. The claim under the Organisation Of Working Time Act, 1997, was withdrawn at the outset of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)