

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

against

Employer

under

CASE NO.

RP5/2007

UD22/2007

MN12/2007

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr P. Pierson  
Mr J. Le Cumbre

heard this claim at Tullamore on 3rd July 2007

Representation:

Claimant(s): Mr. John Kane, Branch Organiser, S I P T U, Sean Costelloe  
Street, Athlone, Co. Westmeath.

Respondent(s): Mr. Bob McCardle, Patrick J. Durkan, Solicitors, Westport,  
Co. Mayo

The determination of the Tribunal was as follows:-

Dismissal as a fact was in dispute in this case.

#### **Claimant's case.**

The claimant said that throughout the period of his employment with the respondent he enjoyed an excellent working relationship with the company. Problems only arose circa August and September 2005 when he indicated that he was unhappy working in the area of lubricants distribution. He sought a transfer from that area, and was informed by management that while there was no other available role within the Birr depot, there was a position at the Athlone depot. He advised

management that he was happy to relocate to the Athlone depot.

The claimant said that up to this relocation he had no written contract of employment but that one was produced for him to sign on his first day in Athlone. However, as he was unhappy with aspects of the document he sought advice on it that evening. This advice suggested that he should not sign the contract, as it was not, in fact, an official contract of employment. When he indicated his position to management the next morning, he was asked 'how official do you want it?' and alleged that he was then told that management were trying to 'get rid of him', hence it was in his best interests to 'look on this favourably'. Matters were left at that, and the claimant worked for the next six months in Athlone.

In February 2006, the claimant returned to work at the Birr depot, having received a telephone call from a Director of the company, who asked to meet with him to discuss that possibility. He accepted the offer, having given it due consideration. However, work practices in the Birr depot had changed in the interim due to computerisation, which he said he found difficult to master. He accepted that he made mistakes when using the system. He explained that management were unhappy with his work performance and to address the issue of his difficulties using the computerised system sent him on a nine-day training course in Galway to bring him up to speed. He said that he asked for help on many occasions but did not receive assistance.

The respondent introduced further new work practices, for example, in the retail area, in particular the sale of diesel to outside markets. The claimant said that he could not sustain the additional level of work, and that he had, on different occasions, had a number of difficult meetings with management where he felt castigated by them for a series of work related problems at the Birr depot. By July 2006, however, the situation had deteriorated to such an extent that he believed management came to a meeting one Monday (17<sup>th</sup> July 2006) to get rid of him. Nothing occurred on that occasion but he was informed that management would hold off until later that week. He was subsequently asked to attend a second meeting with management, which took place at a local hotel. Four members of the management team attended that meeting, as well as the claimant, and this second meeting took place, he said, at approximately 10h.30 a.m.–11h.00 a.m. on the Thursday of the same week (20<sup>th</sup> July 2006). He was informed that the second meeting was a continuation of the meeting held on the previous Monday. The claimant said he told the managers that he couldn't take any more, that he was at breaking point, and it might be best to enter into negotiations with his Union. He stressed that he informed managers that he wasn't walking away from eighteen years of employment. The company undertook to pay him pending resolution of the issue. The claimant left the hotel and returned to the office. Two members of the management team also returned to the office, asked the claimant to return the office keys to them, but he refused, as he wanted the agreement to continue to pay him in writing. When he received the written confirmation, he returned the keys to management and left the premises. He met with his Union representative during the following week and a further meeting was held with two managers at which point they indicated to him that the company would consider making an offer to him but no movement took place on this issue.

He said he had obtained another employment following these events, circa early December 2006, which paid on commission basis, approximating to payment of between €300-€500 per week to him. He confirmed that he was presently employed on a part-time seasonal basis, earning between €100-€150 per week.

In cross-examination, the claimant confirmed the details given in his direct evidence regarding his relocation to Athlone, and transfer back to the Birr depot, which took place between August 2005

and February 2006. He confirmed he sought legal advice concerning the contract of employment given to him on his initial move to Athlone, and agreed that there were no repercussions over his refusal to sign it. He could not recall using the phrase 'I've had enough of you, and you've had enough of me', denied he was aggressive, or used inappropriate language about a manager, at the meeting held on Monday, 17<sup>th</sup> July 2006. He also denied using the phrase 'I'm going, you have to pay me off'. He could not recall a figure of €40-50k mentioned at that meeting. He restated that, following the meeting on Thursday, 20<sup>th</sup> July 2006, two managers returned to the office after him. He agreed that he wouldn't leave the office, or return the keys to the managers, without first having the letter outlining the company's interim agreement to continue to pay him sent by fax to his representative. He disagreed over the timing of sending the faxed communication to his representative. He emphasised that he had not resigned his position.

Under cross-examination, the claimant admitted to having obtained two other positions, both of which were paid on a commission basis.

When questioned by the Tribunal about the operation of a Grievance and Disciplinary procedure within the company, the claimant said he did not understand the question. He agreed that he was holding down two jobs.

### **Respondent's case.**

The **first** witness for the respondent (**Manager A**) outlined the main problems facing the Birr depot around the time of the events leading to the claimant's termination of employment. These problems included, for example, lodgements of cash, as well as customer service issues. These matters were raised at the meeting on Monday (17<sup>th</sup> July 2006) between management and the claimant. He said that he (the claimant) was invited to consider and offer a solution to rectify the work related problems. The meeting held at a local hotel on Thursday (20<sup>th</sup> July 2006) was, he explained, a continuation from the previous one held a few days earlier. Manager A said that during the meeting the claimant stood up, indicated that 'he'd had enough', which he understood to mean that he had finished with the company. As far as he was aware, **Managers B and C** returned to the depot with the claimant. He said he was not present at a further meeting held on 24<sup>th</sup> July 2006.

In cross-examination, Manager A agreed that the claimant was not offered a right to representation at meetings and, by way of explanation, stated that he himself did not see the situation as trouble. He admitted that he had not received a letter of resignation from the claimant.

In reply to questions from the Tribunal, Manager A admitted that the company did not have a policy governing procedures on the handling of Grievance and Disciplinary matters. He explained that the main reason for the presence of four managers at the meeting on 20<sup>th</sup> July 2006 was that they each had responsibility for different functions within the company. The witness was asked to explain the conflict between the company's issuing a letter concerning its agreement to continue paying the claimant pending entering into redundancy negotiations, and their claim that he (the claimant) had resigned his position. In reply, the witness said that the letter of 20<sup>th</sup> July 2006 was given to the claimant in order to retrieve the company keys.

In his evidence, **Manager B** confirmed the work related difficulties at the Birr depot, and supported the first witness's account of the reason behind the meeting, as well as its outcome, of 20<sup>th</sup> July 2006. He contradicted the claimant's evidence that the meeting took place on the morning of 20<sup>th</sup>

July, rather than it occurring mid-afternoon that day. He said that the claimant jumped up, saying that he wanted to be paid off and move on.

He confirmed that he attended the meeting with the claimant's representative, which took place on 24<sup>th</sup> July 2006, when the figure of €40-€50k referred to as a redundancy payment was raised. However, he understood the claimant had resigned his position and felt that no payment should be made by way of a payoff to him. He felt that the company was placed on the spot, on 20<sup>th</sup> July 2006, when the claimant declined to hand back company keys without first obtaining the letter setting out his position, that is, the letter previously referred to which was faxed to the claimant's representative that day.

In cross-examination, Manager B said that there were no minutes for any of the meetings referred to involving the management team and the claimant. He maintained that the claimant was not dismissed but agreed that the claimant had not submitted a letter of resignation to him either.

In reply to questions from the Tribunal, Manager B maintained that he was not in a position to make a final decision on the question of redundancy payments. He stated that while he met with, and listened to the claimant, he indicated that he would have to refer any question of redundancy payment back to management for a decision. He agreed that the holder of keys held a position of authority within a company. He defended the company's position in respect of their continuing to pay the claimant, from 20<sup>th</sup> July until 13<sup>th</sup> September 2006, by saying that they undertook to do so pending the outcome of discussions between the two parties.

In his evidence, **Manager C** also confirmed the work related difficulties at the Birr depot, and supported the previous witnesses' accounts of the reason behind the meeting, as well as its outcome, of 20<sup>th</sup> July 2006. He explained that he had offered support to the claimant in relation to his difficulties on work systems, in particular on computerisation. He attended the meeting of 20<sup>th</sup> July 2006 because he was told of some of the issues to be discussed which fell within his area of responsibility. He maintained that the sole purpose of that meeting was to put forward solutions to deal with problems at the Birr depot, therefore the meeting was mainly technical, and had nothing of a grievance or disciplinary nature to it. He agreed with Manager B that the meeting took place on the afternoon of the 20<sup>th</sup> July 2006. He said that in his opinion the claimant resigned at that meeting, which surprised him greatly as that was not the purpose of the meeting. The claimant's refusal to return the company's keys presented, he said, a security issue for them. The letter of 20<sup>th</sup> July was prepared against that background, whereupon the claimant then handed back the keys once the letter had been faxed to his representative.

Manager C referred to the meeting held on 24<sup>th</sup> July 2006, at which the issue of a redundancy payment of €40-€50k was raised. He said that he indicated that he could not make a decision of that nature either, and that any question of a payment would have to be referred back to management. Manager C confirmed that when he (the witness) returned from holiday he discovered that the claimant was still in receipt of salary. At that point, the claimant was issued with his notice on 6<sup>th</sup> September 2006, and paid up to 13<sup>th</sup> September 2006.

In cross-examination, Manager C confirmed that there were no direct communications between the claimant and him. He maintained that he attended the meeting of 24<sup>th</sup> July 2006 to listen to the claimant's position and to discuss minimum notice and any holiday entitlements owing to him. He was not there to discuss a redundancy payment. However he, too, agreed that the claimant had not submitted a letter of resignation to him.

In reply to the Tribunal, Manager C said that it became obvious circa April to June 2006 that the claimant had difficulties undertaking his duties, that he was trying to work it out with him and to that end he visited the Birr depot on one to two occasions each week to assist. The witness indicated that he was aware of the difference between a redundancy situation and unfair dismissal.

**Determination.**

The Tribunal, having heard the evidence, decide that the claimant was dismissed. The Tribunal also deem that this dismissal was unfair in all the circumstances.

Having considered the remedies under the Act, the Tribunal has decided that the most appropriate remedy in this case is compensation and award the claimant the sum of €6,000 under the UnfairDismissals Acts, 1977-2001.

In relation to the claim for Redundancy, as unfair dismissal and redundancy are mutually exclusive, the claim under the Redundancy Payments Acts, 1967-2003 fails.

The Tribunal deem that the claim under the Minimum Notice and Terms of Employment Acts, 1973-2001 has been satisfied and makes no award under that Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

