

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD289/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr G. Phelan
Ms H. Kelleher

heard this claim at Cork on 21st May 2007

Representation:

Claimant :

Mr Kieran Hughes, B.L., instructed by Ms. Maureen Kelleher, Don Ryan & Co.,
Solicitors, 9 Westbourne Place, Cobh, Co. Cork

Respondent :

Mr Conor O'Connell, Construction Industry Federation,
Construction House, 4 Eastgate Avenue, Little Island, Cork

The determination of the Tribunal was as follows:-

This was a claim for constructive dismissal. The onus of proof under the Unfair Dismissals Acts, rests on the claimant.

Claimant's case:

The claimant told the Tribunal that he commenced his employment with the respondent in February 1993. The respondent had a contract with a company N (site N) in Ringaskiddy and throughout his employment with the respondent the claimant was based there. He worked as a thermal insulating engineer, applying insulation to tanks, pipes and other surfaces. The respondent also had a contract with company N to maintain the plant and equipment on the site. About fifteen months into his employment with the respondent the claimant was asked to do the maintenance work on the site, which was a different job from insulating. He was given a pager by company N and was called if

there were problems with leaks around the plant; he would locate the leak and repair the pipe. Initially he worked with one other employee but over the years this increased to three or four (even more during shut-downs) and the claimant was the supervisor of the group. Later the claimant completed work sheets on a monthly basis and the time sheets on a weekly basis; the time sheets were sent to N for signature and then sent to the respondent.

On 26 April 2005 the claimant received a fax from the respondent's account assistant informing him that he was being temporarily laid off from that day. Whilst there was a lull in the work in January and February 2005, this was normal and he had never been laid off before. There had been no prior discussion about his lay off and he did not receive any prior notice of it. The claimant contacted the general manager (GM) who told that the work was drying up but he could not indicate how long the lay off would last. The claimant worked until the end of that week in order to deal with the paperwork. Prior to his being laid off all the men working under him, except SN, had been temporarily laid off. When the claimant was laid off SN, who had worked under him, had been kept on in his place.

Some weeks later the claimant phoned the respondent to enquire about his job and he was subsequently offered a post in Moneypoint, Co. Clare. He turned down the offer. He was not in a position to travel as his child was an asthmatic. The claimant had no recollection of being offered a job in Tarbet, Co. Kerry by the respondent. As far as the claimant was aware SN was still doing the maintenance work on site N at the time of the Tribunal hearing. SN had been the contracts foreman on the site. SN had been kept on doing the claimant's job. The claimant wanted his job back and felt he had no option but to resign. He tendered his resignation with effect from 31st January 2006.

In cross-examination the claimant agreed that: it was a term of his contract of employment that he travel to work at other locations and that the majority of the respondent's employees travel to sites. He further agreed that, following his resignation from the respondent, he worked on a job in Dunlaoghaire for about five months for a different employer.

Respondent's case:

The respondent's former General Manager (GM), who no longer works for the respondent, told the Tribunal that in early 2005 there was a very significant downturn in the respondent's work in Cork. The witness presented sales figures for the Cork area for the relevant period to the Tribunal. The downturn resulted in the lay off-of a number of the workers, leaving just the claimant and SN on site. Ultimately, the claimant was laid off and only SN was kept on the site. The criteria for selecting employees for lay-off were: length of service, skill base and willingness to travel. SN, the site/contracts foreman was, kept on because he had thirty years' service with the respondent, thirteen and a half years of which were on site N and he had been the first of the respondent's employees to work there, because he was willing to travel and because he was one of the respondent's best workers. Furthermore the respondent kept SN there at that point as a presence on the site, hoping to regenerate work. SN had been doing insulation work "on and off" on the site for four or five years. The fact that SN's name was on the claimant's invoice sheet did not mean that he was working under the claimant; SN's name only appeared on that sheet on very few occasions.

The respondent accepted the claimant's resignation in August 2005 because of his repeated refusals, during his period of lay-off, to travel to locations where work was available. SN had always been paid a foreman's rate of pay. Workers who refused to travel resigned. The respondent had to hire workers to travel to sites where the work was available. Those who returned to work

from lay-off indicated a willingness to travel and were re-engaged on other sites. The workshop on the site was used to fabricate metal for other sites.

Determination:

A genuine lay-off situation existed in the respondent's business. Having regard to the criteria for lay-off the respondent's decision to select the claimant rather than the site foreman for lay-off in April 2005 was reasonable. It was a condition of the claimant's employment that he would travel to sites throughout the Republic of Ireland. Offers of employment on sites in Clare and Kerry were made to the claimant but rejected by him. In the circumstances the claimant failed to discharge the onus on him under the Unfair Dismissals Acts to show that he was either entitled to terminate his employment or that it was reasonable for him to do so. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

