

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

RP53/2007
MN103/2007
UD159/2007

against

Employer

under

**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 J. Sheedy

Members: Mr G. Phelan
Mr K. O'Connor

heard this claim at Cork on 12th November 2007

Representation:

Claimant :

Mr. Patrick G Goold, J. F. Goold & Co., Solicitors,
Macroom, Co. Cork

Respondent :

Ms. Alice Crowley, Ronan Daly Jermyn, Solicitors, 12 South
Mall, Cork

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

At the outset the claims under the Redundancy Payments Acts 1967 to 2003 and the Minimum Notice and Terms of Employment Acts 1973 to 2001 were withdrawn by the claimant's legal representative.

Claimant's case:

The claimant was born in 1962 and is married with two children. He had previously worked as a lifeguard and also worked in the U.K. He joined the respondent in August 2000. He started working as dump truck driver. Following an accident at work on 7th December 2001 he received a settlement of €30K in respect of the injuries sustained. The owner promised that he would look after him with a job. After the accident he was looking after the plant and was loading lorries. Initially he was doing this job on his own and then the owners son shared the job with him.

The respondent asked the claimant to attend Dr H. who is a specialist in occupational medicine. The claimant had a fall at home in September 2000 which damaged his ankle and following on from this he had the accident at work and had now developed arthritis. Following surgery he was sent back to Dr H. who said he was not fit to return to the same type of work. He asked the respondent if there was any alternative work available and he was told no. Prior to his joining the respondent the claimant did a twelve-month computer course therefore he had computer skills. He had to sign on with the Department of Social Community and Family Affairs and told them he did not have a job but did not have confirmation in writing. They told him that the next step would be to apply for Invalidity Pension and he phoned the respondent asking for his P.45 in order to make application for this pension. There were sixty to seventy employees in the company and he had no written contract of employment. At the date of hearing this case he was in receipt of €122 per week pension. Since August 2007 he has been looking for work but without success. He is not fit for manual work. He is currently doing a music course in the College of Music Cork.

In cross-examination when his visit to Dr H. on 29th May 2006 was referred to and that the director went through the doctors report, it was put to him that he said at this point that he did not have additional skills, the claimant said this was not the case as he did a twelve month computer course 1999.

In answer to questions from Tribunal members as to why the respondent sent him for a medical examination he felt it was because he was limping. He sent in medical certificates to the respondent.

Respondent's case:

Medical evidence was given to the Tribunal by a specialist in occupational medicine. He first saw the claimant on 16th November 2004 and confirmed that because of problems with his ankle he was not fit for manual duties. He felt that the claimant could not return to work on that basis. He saw the claimant again on 22nd December 2005 and expected him to be fit for work around March 2006 however when he next saw him on 29th May 2006 his ankle had not improved. He felt that the claimant may not be able to go back to the same type of work for the foreseeable future.

In cross-examination he said he had been asked by the respondent to assess the claimant for his job however he had no record of being asked to give his opinion regarding other work which he might be able to do. He agreed that he was not unemployable.

Evidence was also given by the Director and Chief Executive of the respondent company. The company is in the quarry business with eleven employees. They have two other associated companies and they trade as the Mid Cork Group. The claimant commenced his employment with the respondent as a general operative where he drove the dump truck, shovel and operated the feeding of the tar macadam plant. This was a two-man operation and the jobs were interchangeable with the owners son. The owner, Mr Mc S retired in 2004. The claimant was paid for nine months

following the accident. In 2002 he was paid €38K. He understood the claimant had recovered. Visibly at the time the claimant was having difficulty in walking. Two others checked also, he was visibly limping and had been out of work for three weeks prior to the assessment by Dr H. The respondent is in a high risk industry with 60% of the accidents occurring while operating machinery. Everything would be a risk to the claimant. The cabs on the dump trucks and loading shovels are 10/12 feet off the ground.

Dr H. assessed the claimant. Witness wrote to the claimant on 17th December 2004 in relation to his attendance with Dr H. and this letter was opened to the Tribunal. In this letter the claimant was asked to update the respondent as to his progress on a two weekly basis. The claimant did not make contact every two weeks and witness acknowledged that this might not have been feasible in the claimant's circumstances. Following Dr H's meeting with the claimant on 29th May 2006 he concluded that he was not fit to return to the same occupation. Witness then met with the claimant on 15th June 2006 to discuss the medical report and he wanted to see what alternatives might be available. He asked the claimant if he had additional skills and he knew of his computer course. He then contacted their pension providers and checked with Canada Life in relation to an Income Continuance Claim. The claimant did not submit anything to dispute his being unfit for work. On 19th June 2006 he wrote to the claimant outlining what was discussed at the meeting.

On 14th September 2006 Canada Life approved payment under the Income Continuance. In August 2006 the claimant requested his P.45 and it was issued to him. For eighteen months the respondent kept the claimant's position open and did not terminate his employment. All other alternatives were considered but all would involve physical work and would therefore not be suitable.

In cross-examination he said he did not ask Dr H. what type of work the claimant was actually fit for. There was no process of appeal open to the claimant.

In answer to questions from Tribunal members the claimant's contract was terminated when he requested his P.45.

The financial controller gave evidence of the claimant requesting his P.45 in August 2006 and she posted it to him. Witness referred to letter dated 24th August 2006 to the claimant's legal representative wherein it states that as of the date of the letter the respondent was still paying €240.04 pension to the claimant and were not under any obligation to make this payment. She was shocked at the mention of a redundancy payment and having checked with the appropriate Government Department she was advised that redundancy did not apply in the claimant's circumstances.

In cross-examination witness said she would not normally be asked to issue a P.45 but at the time of the claimant's request the pay clerk was on holidays.

In answer to questions from Tribunal members witness confirmed that payment under the Income Continuance was made from January 2006.

Determination :

The issue before the Tribunal was one of dismissal and whether the employer acted reasonably in the circumstances. The facts before the Tribunal are that the medical evidence which was not contested, that the employee was not capable of carrying out his duties due to his incapacity. The assertion by the claimant was that the employer was obliged to consider alternative employment

and that the employer failed to do so. The Tribunal is satisfied on the evidence before it that while there is no obligation on the employer to find alternative employment, nonetheless the employer did look at the question of suitable alternative work and were satisfied that no such work was available in the company.

The Tribunal unanimously determine that the dismissal was not unfair and the claim under the Unfair Dismissals Acts 1977 to 2001 fails. The claims under the Redundancy Payments Acts, 1967 2003 and the Minimum Notice and Terms of Employment Acts, 1973 to 2001 were withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

