

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD1383/2005
WT209/2007
MN489/2007

Against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. P. Casey
Mr D. McEvoy

heard this claim at Cork on 29th March 2007
and 23rd November 2007

Representation:

Claimant :

Padraig J O'Connell, Solicitors, Glebe Lane, Killarney, Co.
Kerry

Respondent :

Mr Conor Murphy, Murphy Healy & Co, Solicitors, Market
Street, Kenmare, Co Kerry

The determination of the Tribunal was as follows:-

At the outset an application was made to amend Form T1A to include claims under the Organisation of Working Time Act 1997 and the Minimum Notice and Terms of Employment Act 1973 to 2001.

Dismissal was in dispute in this case.

Claimant's Case:

The claimant commenced his employment with the respondent as a mason in February 2004 and was subsequently promoted to the position of blocking foreman. He had a very good relationship with the respondent. On 8 September 2005 he sustained a back injury at work while lifting a window lintel/sill. His doctor referred him to a neurosurgeon who certified him unfit for work for six weeks and told him not to lift heavy weights in future. He posted the medical certificate to his boss (JP) shortly afterwards. While there was no sick pay scheme in operation JP had indicated that he would pay him and he was to hand in his social welfare payments. He was aware that there was no entitlement to sick pay.

On 4 October JP called him in to do a block count. This would generally be part of his job and would take two hours but because of the back injury he was unable to climb the ladder and he had to abandon the count after half an hour. He told the foreman he could not do the count. He was not very happy about being called in as he could hardly drive or walk.

On 5 October JP telephoned and asked him to do a block count in Shandon Street. The claimant told him he could not do it as he "was crippled" from the previous day. JP then asked him about one of the labourers on his team, whom the claimant had accompanied to hospital the previous day because he had broken a bone in his hand. There were fifteen workers on the claimant's team but they were down a couple of labourers to tend the masons. JP told him that the (injured) labourer could tend a mason with one hand but the claimant said he would not ask the injured labourer to come into work because he was off work until the following week. They then spoke about the claimant's injury and JP told him he "was not paying any man to lie on his back" and that he (the claimant) was making a fool out of him. The claimant asked JP if he was telling him that he was fired and JP said, "Yes, I'm f---ing firing you". The claimant asked if he was serious and he told him he was "deadly serious" and hung up. The claimant thought JP was joking or having a bad day and he rang back him two minutes later. He again asked JP if he was telling him he was fired and JP replied, "What part do you not understand? Yes, you are fired". The claimant had no doubt but that he was dismissed. The claimant did not receive any contact from the company after this. At the claimant's request he received a reference from the respondent. It was a good reference.

The claimant denied JP's contention that he quit his job. There was no confusion about his dismissal as JP had clarified the position for him. He was dismissed because he was unable to carry out his duties due to his back injury. When JP would not take his telephone calls he asked for his P45. He was not paid in lieu of notice or for holidays due to him. He obtained alternative employment at a higher wage on 12 December 2005. The claimant was adamant that he had sustained his back injury through an accident at work and in cross-examination he denied having told a work colleague that he had slipped in the shower.

The claimant went in to do a block count on 4 October because the respondent was putting pressure on him to do so. He had gone in on about three occasions to do block counts and had done what he could on the ground floor. He made attempts to work on the second and third floors but he could not climb the ladder. While a quantity surveyor did the block count for the client the claimant was doing the block count for the respondent so that they could agree a count between them. His new job as site foreman does not involve any physical work.

Respondent's Case:

JP confirmed to the Tribunal that he had a good working relationship with the claimant. On 8 September the claimant rang to say he had to go to the doctor as he had hurt his back lifting a window sill/lintel. The claimant rang him before going to the doctor and said he would be off for a few days. He did not receive a letter or doctor's report from the claimant and assumed that he would be out for a few days to a week. He did not come to any agreement with the claimant regarding payment during his sick leave but as a goodwill gesture he paid him. The claimant had a company phone and witness would be in touch with him two/three times a week.

When he telephoned the claimant on 5 October 2005 to check when he would be returning to work, the claimant told him that he had done further damage to his back when he had slipped in the shower that weekend and was unable to return to work. JP told him that he could not afford to continue paying his wages while he was out. The claimant said he was entitled to be paid while he was out on sick leave. Witness was feeling a bit under pressure having to pay his wages for that length of time. He had never been told that the claimant would be out of work for six weeks. He asked the claimant to let him know when he would be ready and fit to return to work. He had not used the words "f---ing fired". The claimant told him that he was going to quit if he did not continue to pay him and that he would get another job. He did not demand that the injured labourer come to work.

The respondent had another foreman in Cork and had asked him to look after the claimant's usual jobs because he could not have men on a site without someone overseeing them. In early October the claimant telephoned him saying he had slipped in shower and had hurt himself again. Witness did not ask the claimant to come into work between 8 September and 5 October and he was not aware if the other foreman did so. He did not tell the claimant that he would pay him while he was on sick leave; he had expected him back to work every week. He decided to stop the claimant's wages because he did not know when he would be returning to work. As far as he was aware the claimant was paid his holiday entitlement. He did not ask the claimant for medical certificates because they were good friends.

The Tribunal also heard evidence from the other foreman employed by the respondent. He and the claimant had sometimes swapped workers between their respective teams. JP contacted him on 8 September 2005 to ask him to keep an eye on the claimant's sites for a few days because of his back injury. The claimant had told witness that he had hurt his back. After 8 September there was no need for the claimant to be on site. He was not aware that the claimant went in to do the block counts. He kept in contact with the claimant while he was out sick and advised him to take things easy. The claimant had told him that he had fallen in the shower and hurt his back. He was not aware of the telephone conversation between the claimant and the respondent on 5 October; he wanted to keep out of it. He only heard about it afterwards.

In cross-examination he said the claimant was responsible for three sites. While he did not see the claimant on site between 8 September and 5 October he could have been there as one cannot be on all the sites every day. The claimant and he relied on each other. There was no need for the claimant to go on site to do the block counts while he was injured; the respondent could have asked witness to do the counts.

Determination:

Dismissal was in dispute in this case. Having considered the conflicting evidence as to the contents of the telephone conversations that took place between the claimant and the employer on 5 October 2005 the Tribunal, on the balance of probability, accepts the claimant's evidence on this issue. Accordingly, the Tribunal finds that the claimant was dismissed. As there were no grounds to justify the dismissal the Tribunal finds that it was unfair. The Tribunal awards the claimant the sum of €3,960 being six weeks' loss, calculated on his average weekly earnings, under the Unfair Dismissals Act 1977 to 2001.

Because the claimant was on sick leave and therefore unable to take up alternative employment during his notice period his claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 fails.

The claim under the Organisation of Working Time Act was lodged outside the statutory six-month period for initiating a claim under the Act. The claimant asked the Tribunal to exercise its discretion to extend the time for making a claim under the Act on the basis that he was confused when completing the form initiating claims with the Tribunal and believed that once he had indicated that he was initiating an unfair dismissal claim that his holiday claim would also be dealt with by the Tribunal. The Tribunal finds that this does not constitute reasonable cause entitling it to extend the time for lodging the holiday claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

