

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

8 Employees

UD323/2007

UD326/2007

UD328/2007

UD325/2007

UD457/2007

UD324/2007

UD322/2007

UD327/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Cagney BL

Members: Mr J. Horan
Mr A. Butler

heard this claim at Dublin on 25th July 2007
and 19th November 2007

Representation:

Claimant(s): Ms. Rosemary Mallon BL instructed by Mr. Marcin Szulc, Maguire McClafferty,
Solicitors 8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent(s): Mr. Stephen Sands, Construction Industry Federation,
Construction House, Canal Road, Dublin 6W

The determination of the Tribunal was as follows:-

Background

The representative for the respondent told the Tribunal that IR issues arose in the company and the trade union were called in. Due to a downturn in business a number of employees were let go over a three-month period.

Counsel for the claimant outlined to the Tribunal that all the claimants with the exception of one are now employed. They found alternative employment within two to four months after they were let go. The claimants were employed as craftsmen and sixty polish workers went on strike so that they could get the rate of pay that they were entitled to. During the strike a number of comments were made to the claimants by agents of the respondent company. The claimants were informed that they would be dismissed in six months and within six months they were all made redundant.

Respondent's Case

The director of the respondent JL told the Tribunal that the respondent manufactured and installed wall partitions and it provided specialist applications of a store renderer. An external renderer was subcontracted to undertake work on the majority of main buildings. The claimants worked in the rendering side of the business and they were skilled in external acrylic rendering which was not a recognised trade. The respondent had contacted FAS many times to try and get a course in acrylic rendering but FAS would not do it. New projects were delayed and the respondent hoped to win some large contracts but it did not. Staff were moved from project to project. Due to a downturn in business staff were let go week by week.

The projects that the claimants worked on terminated and there was no replacement work for them. Other projects were coming to a close. The claimants worked on more than two projects for the respondent. The claimants were not let go due to an industrial relations issue. An issue arose on 9 September 2006 and the claimants contacted the union. Issues were discussed, agreed and implemented and the matter had concluded by 2p.m. that day and no other issues were raised. All employees were members of a trade union. Prior to the redundancies the director contacted the union and informed them of the number of employees that were being let go. He wanted to ensure that a strike would not re-occur. All the claimants received a letter notifying them of the shortage of work, anyone that was entitled to redundancy received it and one of the claimant's RC, who had two years service received redundancy.

In cross-examination the director stated that the claimants were not plasterers. The claimants applied acrylic plaster and were not trained craftsmen and had not attended FAS. The respondent went to Poland in 2005 to recruit operators and it hired ten employees through word of mouth. One hundred and twenty six employees were employed. On occasion he subcontracted work. Different nationalities worked in the company and an Irish foreman as well as some Irish installers were employed. Out of one hundred and ten employees it had seven installers. Six to seven Irish employees were not supervisors. A ganger would lead a group of individuals and had a supervisory role. In September 2006 four to six non-national supervisors were employed. The director did not have day-to-day dealings with staff on site. The respondent employed twenty office staff, and approximately ten supervisors/foremen. Out of the total workforce eighty to ninety per cent were Polish. About ten of the eighty per cent were supervisors/gangers. The number of employees who undertook metal work and plastic work varied from time to time and up to the date of the strike it was fifty per cent. The respondent had ten sites in operation in September 2006.

Asked what the rate of pay for employees was up until September 2006 he responded it varied between employees, he could not give an exact figure but he thought it was €13,48 per

hour. Asked what was the going rate at the time of the dispute he responded it was different for different employees. Asked if he recalled when the claimants went on strike and if there was clarification on their earnings he responded that there were lots of issues, which were dealt with. All employees were members of a union and he was in regular contact with the union. As a result of the strike some employees were regraded.

Asked if employees could be paid hourly or per square metre he responded that on occasion employees were paid hourly. He did not make a comment that one Chinese worker was the equivalent to three Polish workers. Of the employees that went on strike forty are still employed with the respondent. He could not recall saying that the respondent would go bust on the day of the strike. A temporary lay off arose prior to the builders' holiday last year. Asked if a supervisor CY told the claimants that they would be dismissed within six months he responded that employees had worked for some short weeks due to a shortage of work. New grades were to be implemented immediately. It did not have full time hours for all staff. Asked if the registered employment agreement was either a guideline or not he responded it covered general operatives A – D. The respondent received bad publicity due to the strike.

The respondent let go metal workers and renderers, as there was a downturn in both types of work. He did not know when other projects were going to start. He informed all employees that if he had work for them in the future he would contact them. The respondent employed subcontractors as and when it needed them. It had let go forty five per cent of employees and it managed to retain a certain core.

It was not the case that Polish employees were dismissed in the first round of redundancies; employees were let go as the job finished. Asked if work was available he responded that there was no site that he could assign employees to. New employees were taken on in the last month and it uses the same subcontractor now as it did then. Mr. C received two weeks notice a week after his employment ended.

In answer to questions from the Tribunal the director stated that employees were made redundant site by site. If it had site work he would have transferred employees to it. When a project was completed on a site employees were moved to another site if work was available. Asked how many employees were laid off and rehired he responded that he did not have any work for them. Asked if he was a caring employer he responded that he would like to think so.

At the resumed hearing on 19 November 2007 in re-examination the director JL told the Tribunal that four subcontractors were employed on 11 September 2006. The respondent had one subcontractor in January and February 2007 who undertook specific work. This subcontractor fitted timber, and undertook fireproofing and plaster drawing.

In further cross examination JL stated that from the 13 November that staff had increased for a number of reasons and other employees came and went. A number of employees were paid at the end of each week. Office staff did not participate in the strike on 11 September. Asked why he dismissed three employees and why he did not ask them to return to work for him he responded that he was informed by head office that a serious incident had taken place, which resulted in disciplinary action. Asked if three other employees who worked on the site were dismissed within a month he responded that employees were thrown off the site by the person in charge of the site for breach of health and safety regulations. Employees were not happy to work for one two, three and four days and on 11 September it was agreed to take them on for a full week and he had a considerable amount of work to complete. After Christmas work was finished and he had no work

for the foreseeable future. Asked what happened in January which resulted in eighteen employees being let go he explained that there were two different types of work, external render business and metal steel business and the type of work changed. Asked if he undertook work in Scotland he responded that a competitor undertook work in Scotland. He disagreed that four Polish workers were taken on in May 2007 at the rate of €15.80 per hour.

Claimants' Case

The first named claimant PB told the Tribunal that he commenced work on 10 January 2005 and finished on 10 February 2007. After the strike his earnings were €740.96 per week and his net pay was €577.84 per week. He undertook installations work in sites in London and in Ireland. He worked in the factory and he was given factory level wages. Prior to the strike he earned €13.50 per hour and after the strike he earned €16.80 per hour. The factory rate was €11.50 to €12.50 per hour. He worked for three to four weeks in the site in Limerick, and then moved to Castlebar and then to Dublin. There were no redundancies in any of the sites prior to 11 September. All Polish employees and supervisors went on strike on 11 September. Only two site workers were employed in the factory. Two of the directors went to the employees with their personnel files and to put it nicely employees were told to leave. He felt that employees did not want to be on strike. He telephoned his friends in Dublin where the strike HQ was located and five minutes later the directors told the claimants to return to work that everything was resolved with the trade union.

The situation on 11 September was resolved on the day. The strike was about the rate of pay and accommodation, which was provided by the respondent. A memo in Polish issued from the company on 12 September. He did not receive back pay after the strike. There was a lengthy article in a Polish newspaper regarding the employees that participated in the strike. The respondent took on four employees MO, JZ, TZ and AJ in May. He was aware of this because he shared accommodation with one of them. The second was a friend from secondary school and college and they were paid €15.80 per hour. These four employees were steel fixers. He was aware of three other employees but he did not know the names. They still work on a site in Tallaght and also worked in Dundrum. He knew that they were preparing work for installations. He worked on a service site for a company during the strike week. On the day of the strike one of the directors stated that Polish workers could be replaced by Chinese, Czech or Slovakian workers. He did not hear first hand that within six months employees on site were going to be dismissed. He obtained alternative employment in mid April. He registered with three employment agencies and FAS and he looked for work on websites and forwarded CVs. He obtained a job in mid April on a concrete site and his take home pay was €420 to €430 and overtime was not available. He changed jobs a few times and the difference in his pay was quite significant and there was no opportunity for overtime.

In cross-examination when asked if he was fired because he was in the trade union he responded that being a trade union member related to the strike. He paid his membership to the trade union on a weekly basis soon after he commenced employment. Employees organised the strike and it was related to rates of pay. Asked if he decided to go on strike on 11 September at 7 a.m. he responded that over the weekend employees decided to go on strike. He asked to be returned to work on the construction site. He spent four months in the factory and he continued to pay for accommodation in Dublin. When he undertook work on the site he received a higher rate of pay than when he undertook work in the factory. He did not contact the trade union when he did not have a job. Asked if the matter was resolved on the day he responded that some agreements were reached in Dublin that he was not aware of. The director came to him to take him back to the factory and told

him everything was in order. He could not comment on the consultation with the trade union. After meeting with the trade unions he undertook work in a construction site in Limerick. Within two to three weeks the rates of pay increased.

He had an issue in relation to back pay and it was not resolved. It was more important to keep on working for the respondent. His rate of pay increased and he received travel allowances. He sent two letters to the union regarding the issue of back pay and he did not retain a copy. He was dismissed due to the strike and he received notice of lay off. He was told that the employer always has the right to dismiss him. Asked if it was extraordinary that a trade union told him that an employer has the right to dismiss he responded that is what he was told. He then concentrated on getting a job. He telephoned the trade union's Polish representative. During the two week Easter period he returned to Poland. He has been unemployed for the last two weeks.

In answer to questions from the Tribunal when asked if he was dismissed because of trade union activity he responded that is what he concluded and he was told that he would be replaced. Asked if he accepted that the respondent did not have work available for him he responded no that there were new projects. Asked who were the four employees he responded that two were his friends and they undertook work that he was doing. Asked what work was that he responded assembly, steel construction in walls and installations.

The second named claimant JP told the Tribunal that he commenced employment with the respondent on 4 March 2006 and he was dismissed on 19 January 2007. He earned €740.96 gross per week and he was employed as a plasterer. Before the strike began he earned €13 per hour and after the strike he earned €16.84 per hour. He was not aware of any redundancies prior to the strike. All employees went on strike. Two trade unions were involved and he was a member of a trade union. Employees informed the site manager of the strike. At the time of the notice of redundancy he was employed in a construction site in the Phoenix Park. He heard rumours about employees been taken on and he did not know how true they were. After the strike Irish employees were hired and he and his colleagues trained them in and had to correct work after them. The claimants prepared the walls and subcontractors finished the walls. He returned to Poland for Easter and a fellow passenger told him that he worked on the site in Tallaght where the claimant and his colleagues started. This person told the claimant that he did exactly the same work as the claimants did. At this point he had been dismissed for three months. In May of this year he obtained alternative employment and he earns €500 for a five-day week. He went to a recruitment agency and he sought work over the telephone. He often worked on Saturdays for which he earned €100.

In cross-examination JP stated that prior to the strike everything was fine. A union representative told him to stand up for his rights and if he and his colleagues did not no one else would. Asked how long he was in the trade union before the unofficial action he responded since he commenced employment. On the day of the unofficial strike fifty or sixty employees came from other sites. He spoke to the director JL who told him that employees could be sacked. The manager was notified that the strike was to take place and the claimant went to work at 7 a.m. Employees decided that if there was no change of attitude they would go on strike. As far as he was concerned the trade union did not do anything. Asked if it was an illegal strike he responded they were trying to find out something. During the unofficial action the trade union was involved in negotiations. Asked if the issues were resolved with the trade union he responded that the issues were resolved in writing but not in fact. He did not receive the back money that was due to him. Employees who were not supposed to be dismissed were sent to another site. Two days earlier on Thursday six or seven employees were moved to a different site. Asked that his rate of pay at the moment was below the

registered employment agreement rates he responded that this was quite possible but he needed a job. He was aware of the rates but he took the job as he needed the money. As far as he knew he was a member of a trade union, he could not get a better job opportunity and he did not go to the trade union.

In answer to questions from the Tribunal when asked if he ever worked in Tallaght he responded no that he had not. The claimants contacted the trade union who informed them of their rights and what they could and should do. He believed that he was dismissed for trade union activity. He stated that the company had work, which he could have undertaken. He heard from colleagues that four people were taken on after he was dismissed.

The third named claimant AZ told the Tribunal that he commenced employment with the respondent on 23 August 2005 and he received his dismissal notice on 19 January 2007. After the strike he earned €740.96 gross per week and his take home pay was €589.84 per week. He was employed as a plasterer and prior to the strike he earned €13 per hour and after the strike he earned €16.84 per hour. While employed in the company he undertook work in various locations in the country. Sixty to seventy employees went on strike and supervisors and foremen in the company did not go on strike. He spoke to CY a supervisor in the respondent who told him that he would be dismissed in six months. He was employed in a site in the Phoenix Park when he was given notice of his purported redundancy. Employees that went on strike were dismissed and were told that there was a lack of work or no work. He heard rumours that employees were taken on. After he was dismissed he worked for a wholesaler who sells bananas. He worked for a couple of days on a construction site. He has not been paid for this work. He has finished employment with the banana wholesaler.

In cross-examination he stated that he knew CY who was a manager. He contacted the trade union by telephone regarding the unofficial strike. He did not speak directly to the trade union as he was employed in Limerick at the time. It appeared that issues were resolved. He heard that he was going to be dismissed within a year. He believed that he was dismissed due to trade union involvement because he went on strike. Asked why he did not speak to the trade union he responded that he was of the opinion that they would not do anything for you. He did not see any point in going back to the trade union and he felt that the union would not help him to get his job back. Asked if the job on site finished he responded no. Asked if a Polish employee was a supervisor he responded that he left the company. He had heard that new staff were hired to do the job that he did but he did not know who they were.

The fourth named claimant RC told the Tribunal that he was employed on 23 January 2005 as a plasterer. After the strike he received €743.23 per week. He worked for a year in various sites. He received €16.84 per hour after the strike. Foremen or office staff did not go on strike. He received his redundancy payment from the respondent. His supervisor telephoned him and told him that he had a cheque for him. He did not really understand what his redundancy payment was as the meeting was very brief. When employees contacted head office they were informed that they were going to be dismissed in six months. He was employed in the site in the Phoenix Park when he was dismissed. He believed that there was work to be done on this site. He did not know if employees were taken on after his dismissal. He heard rumours, that employers were employed as plasterers. It took him almost a month to obtain alternative employment. He spent two weeks in Poland and he then returned to Ireland. He sent CVs to companies via the Internet and he registered with FAS. He is in receipt of the same rate of pay as he earned with the respondent.

In cross examination he stated that he did not get to talk to the union regarding the strike. He spoke to his colleagues on the site about it. Asked if he was aware that the trade union dealt with the matter before he responded that he spoke to JL and could not get any result. He believed that he was dismissed due to trade union activity. His trade union membership was deducted from his payslip. Asked if the issue was resolved on unofficial strike action he responded that he could agree. He spoke to a union representative on site. He felt that the trade union was not a good one.

He heard that he was going to be dismissed due to strike activity. Asked if he spoke to his trade union he responded the trade union representative was present.

After his dismissal he went to Poland for a while and he obtained employment after he returned from Poland. He did not know if anyone was hired to do the claimant's job after he was dismissed. Asked if 45% of workers were let go he responded that he thought so. He did not speak to the trade union when he was laid off. Asked if he was dismissed due to being a member of a trade union he responded he did not know but he thought he was.

The fifth named claimant WS told the Tribunal that he commenced employment with the respondent on 5 April 2005. He was dismissed on 1 February 2007. After the strike his gross pay was €740.96 per week and prior to the strike his earnings were €589.23 per week. He worked as a steel fixer and worked in sites in Dublin and in the country. He was employed in Spencer Dock when he received notice. He earned €13.00 per hour prior to the strike and it increased to €16.84 per hour after the strike. Prior to the strike he could not recall if a redundancy occurred. He received back pay after the strike. Work was not finished on the site at the time of his dismissal. He thought that there was work in Spencer Dock. During the strike he heard from colleagues that he would be dismissed in six months. Two new steel fixers were taken on since he was dismissed. He was sure that he could undertake work on site. He was unemployed for three months and he then worked with a recruitment agency for three weeks for which he received €12.70 per hour. He visited many agencies and construction sites.

In cross-examination when asked if 45% of the workforce were let go he responded that he thought so. He did not speak to the trade union when he was laid off. He could not recall if his colleagues on site spoke to the trade union. Asked if he was dismissed due to trade union activity he responded that he did not know but he thought so. Asked if eighteen employees were let go at the time he responded that could be the case and they were all members of a trade union. He went on strike in solidarity with his colleagues. He did not speak to the trade union about his dismissal. Asked if the trade union did a good job for him and his dismissal was due to union activity he responded he was not given any other reason for dismissal.

In answer to questions from the Tribunal when asked if he was involved in ongoing unofficial industrial action he responded he was not. Asked if employees were let go due to the unofficial action he responded that is what he thought. Asked why he was let go if the strike action was official he responded that he did not know. He worked in Spencer Dock for around two months and this was the last site that he worked on. He had worked on a batch of balconies and after dismissal new fixers were hired to work on Spencer Dock.

The sixth named claimant AC told the Tribunal that he received notice of dismissal on 19 January 2007. He was employed as a plasterer and he initially was employed in sites in Dublin and Meath. He then worked in a construction site in the city centre. On the day of the strike he did not speak personally to JL, he spoke to the Polish foreman. He stated that JL said that one Chinese worker could do as much as two Polish workers. A week prior to the strike he spoke to JL about the increasing rate of pay and he was only interested in the rate of pay. Prior to the strike his

rate of pay was €13,00 per hour and after the strike he earned €16.84 per hour. It was reported that the strike action was illegal. Employees were told to return to work and that they would get everything they wanted. He did not understand why the strike was illegal, JL was aware that employees were going to go on strike. Someone made a remark that they were going to be dismissed. He was a trade union member in February 2006 but not in January 2007. He was not aware if subcontractors and employees were taken on after he was dismissed. He obtained employment last Thursday. He did not instigate strike action. The issues were resolved and the trade union did an excellent job.

In cross-examination he stated that he did not initiate the strike and the unofficial strike action was resolved. After the strike he worked with the respondent for five months until January. Asked if he spoke on behalf of his colleagues he responded he did not know what other people thought. After the strike wages were increased. Asked if employees were told that they would be dismissed and if he raised this matter with the trade union he responded that the respondent dismissed employees within five months and they were not aware that this would happen. During the strike this matter was discussed. After the strike he did not raise it, as he had to focus on more important issues like finding a job and an apartment. The employees got what they wanted and there was no point in aggravating the situation. Asked did he not think that it was important to talk about dismissal with the trade union he responded it was not relevant to him any more and they were just dismissed and treated like pigs. He did not ask the trade union about alternative work and he looked for work on his own.

In answer to questions from the Tribunal when asked if he asked for a reference from his employer he responded he could not recall. It was untrue that he was dismissed by way of redundancy. Asked if there was work available for him to do he responded that there was. After he left the respondent work was undertaken by his colleagues. Asked if new employees were hired to do the work that he did on site he responded he did not know and it was just what he heard.

Determination

The Tribunal are of the unanimous opinion that the claimants were let go due to a downturn in the respondent's business and therefore their claims under the Unfair Dismissals Acts, 1977 to 2001 fail. The fourth named claimant RC who had the requisite service required for statutory redundancy received a redundancy lump sum. He was the only claimant who had the requisite service.

As there was no attendance by the seventh and eighth named claimants at the hearing their claims under the Unfair Dismissals Acts, 1977 to 2001 fail for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

