

## EMPLOYMENT APPEALS TRIBUNAL

**Claims Of:**

Employee

MN385/2007

**Case No.**

UD528/2007

WT167/2007

against

2 Employers

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. P. Pierson  
Ms. E. Brezina

heard this claim at Portlaoise on 6th February 2008 and 11th April 2008 and 26th May 2008

**Representation:**

Claimant: Mr. Michael Binchy B.L. instructed by Ms. Melody Revington, Tiernan & Co.,  
Solicitors, 144 Lower Baggot Street, Dublin 2

Respondent: Mr. Tommy Taylor, 22 Cypress Park, Templeogue, Dublin 6W

**The determination of the Tribunal was as follows:**

These claims were heard simultaneously with UD527/2008, MN384/2007 and WT166/2007.

**Respondent's Case:**

Witness A for the respondent gave evidence that he was asked by a director of the company to "normalise industrial relations within the company". The respondent was a small company initially but it had expanded very quickly. Witness A advised the company on general disciplinary procedures. The company had thirty employees at this time. Witness A advised the company to put the pay rates in order from January 2007 and to negotiate settlements with the employees. A disclaimer form was prepared to buy out liability from the employees for past non-compliance. The vast majority of employees signed the disclaimer.

The safety advisor (hereinafter SA) to the company gave evidence to the Tribunal. SA inspected scaffolding on the 29 January 2007 and he prepared a report. SA's report was submitted to the Tribunal. SA wrote in his report that scaffolding was built on a sand pile and did not have any sole bolts. The boards on the main walkway were broken and cut. The scaffolding was missing handrails both inside and outside. SA telephoned MD of the company and gave him a verbal report on the 29 January 2007. SA prepared his written report and posted it a number of days later.

In reply to questions from the Tribunal, SA stated that after he had completed his inspection he closed part of the site where the scaffolding was located for safety reasons.

A senior scaffolder (hereinafter SS) gave evidence to the Tribunal that he has worked with the respondent for approximately five years. SS is a shop steward since December 2007. He was asked to meet with MD's father regarding the disclaimer form. SS stated that some employees signed the disclaimer form and others did not. Although SS was not a shop steward at the time the disclaimer form was circulated he was not aware of any pressure exerted on employees to sign the form.

SS was aware of the scaffolding audit, as he was the person who dismantled and rebuilt it after SA's inspection.

In reply to questions to questions from the Tribunal, SS stated that there were approximately 6 –10 complaints received per year that related to scaffolding.

The Operations Manager (hereinafter OM) gave evidence to the Tribunal that he commenced employment with the respondent in mid 2006. The claimant was an average scaffolder. However, over time the claimant's work performance disimproved. OM gave the claimant a written warning in October 2006. Copies of the warning were submitted to the Tribunal. The warning related to the falsifying of time sheets.

OM gave the claimant a second written warning on the 29 January 2007 for poor work performance. OM is an advanced scaffolder and he submitted a report to the Tribunal that he had prepared after inspecting the claimant's work. OM carried out this inspection as a result of a complaint received. OM also inspected the scaffolding after SA carried out the safety audit. OM raised concerns he had about the claimant's work at a management meeting.

OM was also involved in the final written warning provided to the claimant. The claimant was asked to attend an investigation meeting on the 12 February 2007, as a complaint was received from a foreman on a construction site. The complaint related to scaffolders taking extended breaks. All of the employees involved received a written warning.

During cross-examination OM stated that he had recommended to MD that the claimant should be reprimanded. He did not recommend to MD that the claimant should be dismissed.

The Managing Director (hereinafter MD) of the company gave evidence to the Tribunal. The claimant was a good employee initially however by 2006 his attitude was difficult to manage.

After the claimant and most of the other scaffolders received the warning in October 2006, relating to falsified timesheets, the company installed a track and trace system. MD explained that it was important that an employee fill out their timesheets according to the actual hours they worked. In one specific example, the claimant inserted that he had worked 57 hours when he had actually

worked 56.5 hours according to the sign in/out sheets on site. The respondent had to issue credit notes to the clients that were overcharged. There were other instances where the claimant had entered extra time and MD stated that it looked to the client as though the respondent was trying to charge them for extra hours.

On the 29 January 2007 MD received a telephone call from a client who told him a deadline was not met. MD sent CM to the site to investigate. On the 2 February 2007 MD received a report from CM and as a result of this the claimant received a final written warning. The warning was given to the claimant in writing in both Polish and English. The claimant was given the warning at a meeting and a colleague of the claimant's was present to interpret.

The claimant was given a further written warning when SA provided his report to MD about safety issues relating to scaffolding that the claimant had erected. There was a delay in dealing with this issue, as an investigation was carried out. Due to this MD decided to give the claimant a final written warning again. This warning and the previous warning were combined into one warning and no further action was taken. A meeting was held and the claimant's colleague was present to interpret.

The claimant was moved to a larger site. MD received a report from the foreman of this site about the attendance of the respondent's employees. The foreman on the site asked MD to speak to the employees about taking extended breaks. MD had to credit back an hour for each employee to the client. On the 15 February the respondent received a written complaint from the client and MD's father (now deceased) asked for a meeting with the employees. A colleague was present to interpret at the meeting. Each of the employees admitted to taking an extended tea break except for the claimant. One of the claimant's colleagues gave a statement that all the employees left the site together and returned together. MD asked the claimant again about the extended break and the claimant denied it again. The foreman had stated also that he had seen all of the employees leaving and returning together. The security guards log in book also reflected that the employees had taken an extended break. MD and his father made the decision to dismiss the claimant, as he already had a final written warning.

During cross-examination MD stated that the warning received by the scaffolders in October 2006 was to remain on their employee file for six months.

MD stated that on the 2 February 2007 it was put to the claimant that he had falsified time sheets and about his general lack of work. The claimant was also provided with the report from the 29 January 2007. On the 2 February 2007 the written warning was handed to the claimant. Another meeting was held on the 5 February 2007. MD stated that he had carried out an investigation and the warning was typed in Polish for the claimant. The warning was prepared in advance of the meeting with the claimant.

MD confirmed that the claimant was not given copies of statements prior to the disciplinary meeting on the 16 February 2007. It was put to MD that this was unfair as the claimant was only told at 5pm on the 15 February 2007 to attend a disciplinary meeting on the 16 February 2007. MD stated that the claimant's right of appeal was outlined in the letter. A final written warning remains on an employees file for twelve months.

The claimant was dismissed without notice. The claimant was not dismissed for gross misconduct; therefore MD accepted that the claimant was entitled to minimum notice.

### **Claimant's Case:**

The claimant gave evidence that on the 22 January 2007 he had difficulty gaining access to a site as the site was locked. He contacted CM who eventually told him to attend at a different site. When the claimant arrived at the other site the foreman was unhappy as the scaffolders were supposed to be there earlier. CM arrived later in the day and told the claimant that he had not done enough work that day. The claimant stated this was because he was not on the site for the full day.

The claimant stated that on the 8 February 2007 he was invited into the office where MD told him there was evidence that in October 2006 he had forged his timesheet and also that the company had received a complaint about his work. An interpreter was present at the meeting. The claimant started to offer an explanation but MD interrupted him and told the claimant that what he was saying "was not relevant." The claimant was offered money if he signed the disclaimer. This document was written in English and Polish. The claimant asked for and was given a period of time to consider this document. After consideration the claimant decided not to sign the document and he informed MD of this on the 12 February 2007.

The claimant attended the meeting on the 16 February 2007 and a colleague was present to translate. It was put to the claimant that he had forged time sheets and that his work performance was poor. The claimant's colleague translated for him that there was no need for the claimant to defend himself as the decision had already been taken to dismiss him. The claimant was told that he was dismissed and he received his P-45 by post a number of days later.

The claimant stated that he had tried to defend himself at the meeting by explaining that he was 30 minutes late for work on the 8 February 2007, as there were traffic problems due to bad weather.

The claimant confirmed that he did not receive documents in advance of the meeting on the 16 February 2007. He stated that the first time he became aware of a safety issue with scaffolding he had erected was at the hearing on the 11 April 2007.

The claimant gave evidence relating to loss.

During cross-examination the claimant stated that he did not receive a warning on the 25 October 2006 regarding incorrect hours on a timesheet. The claimant saw the second written warning at a meeting but he was not given a copy of it and he did not receive the attached letter in Polish. The claimant also stated that CM did not speak to him about productivity and he had not received a final written warning from the company on the 5 February 2007. The claimant denied returning late to the site on the 12 February 2007. The claimant confirmed, when asked, that he had not received a first, second or third warning and he denied taking an extended tea break.

### **Determination**

The Tribunal has considered the evidence of the claimant and the respondent company herein. It is accepted that the company has to be seen to conduct itself with the utmost integrity in the application of its procedures. In particular, the company has to ensure that a non-English speaking member of staff fully understands the regulations and rules of the workplace, how its disciplinary procedures are implemented and where possible translations/translators and interpreters should be provided.

In the course of his employment there were clearly some difficulties with the claimant's standard of work, his time keeping and possibly his general attitude. The Tribunal accepts that in the course of implementing a disciplinary process the company fell well short of what the rules of Natural Justice would require. In terms of outcome it is not clear that had correct procedures been applied, the outcome would not have been the same.

The Tribunal therefore finds that the claimant succeeds under the Unfair Dismissals Acts, 1977 to 2001 but that he contributed to the ultimate outcome. In particular, the Tribunal does not find it credible that the claimant had no notice or knowledge of the letters of warning, complaints and investigations, which were dealt with and referred to in the course of the evidence.

Further, the Tribunal does not accept any real effort has been made to mitigate losses. The Tribunal awards the claimant the sum of €3,000 under the Unfair Dismissals Acts, 1977 to 2001.

In the course of evidence MD accepted that the claimant had an entitlement to notice. The Tribunal awards the claimant €1,128.00 being the equivalent of two weeks wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

The claim under the Organisation of Working Time Act, 1997 was withdrawn during the course of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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