

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD191/2008

RP152/2008

MN182/2008

against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Hayes B.L.

Members: Mr. M. Noone  
Ms. E. Brezina

heard this appeal at Dublin on 30 July 2008

#### **Representation:**

Claimant:

Ms. Fiona Crawford B.L. instructed by Mr. Niall Heaney  
Doyle Hanlon Solicitors, 6 Richmond Road, Drumcondra, Dublin 3

Respondent:

Mr. Thomas McDonnell, Leo F. Branigan & Co. Solicitors,  
6 New Street, Longford, Co. Longford

The determination of the Tribunal was as follows:

At the outset the claim under the Redundancy Payments Acts, 1967 to 2003 was withdrawn. The Respondent employed the Claimant as a groundwork foreman. He was dismissed on the 13<sup>th</sup> September 2007 for gross misconduct.

The Respondent gave evidence that sometime previously he had noticed that the Claimant's telephone bills were excessively high. He said that he warned the Claimant about this. He also gave evidence of another occasion when he called unexpectedly to a site in the late afternoon and discovered the Claimant going home early with the site in an unsafe condition. He said that he warned the Claimant about this. The Claimant accepted that, for a period, there was excessive use of the phone, for which he had repaid the Respondent. He also accepted that he had left work early. However, he denied that the site had been left in an unsafe manner.

No evidence was adduced as to when these warnings may have been given. The Claimant told the Tribunal that he viewed them as complaints about his conduct rather than warnings and that he mended his ways in response to the complaints. The Tribunal is satisfied that they were not warnings in the disciplinary sense. An oral warning is not a casual matter and, although it is a lesser sanction than a written warning, ought to have some formality.

The Respondent told the Tribunal that, just before the builders' holidays in late July 2007, he took the Claimant's company mobile telephone. The Claimant subsequently obtained his own telephone.

In September 2007 the Claimant was sent to work at a site in Lucan. The Respondent had arranged for a digger to be brought to Lucan from another site. However, the safety pin was not attached to the digger's bucket. The purpose of this pin is to prevent the bucket falling off should the hydraulic attachments fail. Such an occurrence has the potential to cause serious injury. The Respondent, on noticing that the safety pin was not with the digger was concerned about the health and safety issue.

He sought, on a number of occasions, to contact the Claimant by mobile telephone but the Claimant did not answer. He telephoned the site foreman and asked him to have the Claimant telephone him. He did receive a call from the Claimant shortly thereafter but could not answer it because he was on another call. He saw that the Claimant had telephoned from the site office and he tried to ring him there. By the time that he did so the Claimant had left the site office again. The Respondent drove to the site and stood outside the site office and telephoned the Claimant, who was inside with the site foreman. He watched as the Claimant took the ringing telephone from his pocket, looked at the incoming call number and put it back without answering it. The Claimant said that he had been on the telephone in the site office and had seen the Respondent drive in. When the Respondent telephoned he saw no need to answer. The Respondent asked the Claimant to step outside whereupon a heated row ensued. The upshot was that the Claimant was summarily dismissed.

Health and safety is clearly an important matter in any place of employment, but perhaps especially so on building sites. However, the Claimant was not dismissed for any disregard of health and safety. He did not know of the Respondent's concerns in this regard. The Respondent could easily have sent the Claimant a text message or left a voicemail message. He could have explained the difficulty to the site foreman, to whom he spoke. Indeed, when the Claimant did telephone, he could have interrupted his other telephone call so as to pass on this important message. He did none of these things.

The Respondent told the Tribunal that the Claimant's dismissal was the culmination of a row during which "harsh words were exchanged". A few days later he sought to get in contact with the Claimant to offer him his job back. He had, he told the Tribunal, acted in the heat of the moment. This appears to be a reasonable assessment of what had transpired. A realisation within days that one has acted in the heat of the moment and a concomitant attempt to persuade the employee to return to work are hardly actions consistent with a summary dismissal for gross misconduct.

The Tribunal is satisfied that the Claimant's dismissal was not warranted in the circumstances. It is also noteworthy that the Respondent had no disciplinary procedure in place. There was a noticeable lack of fair procedures. In all the circumstances the Tribunal is satisfied that the dismissal was unfair. However, the Tribunal is also satisfied that the Claimant's actions in avoiding his employer's telephone calls contributed to his dismissal. Much was made of his company telephone having been taken from him and that he ought not to have to take work calls on his personal telephone. The Tribunal is satisfied that this caused irritation, which led to the failure to answer.

In the circumstances the Tribunal, in respect of the claim pursuant to the Unfair Dismissals Acts, 1977 to 2001, awards compensation in the amount of €7,500.00 as being just and equitable.

In respect of the claim pursuant to the Minimum Notice and Terms of Employment Acts, 1973 to 2001, the Tribunal, having taken into account that the Claimant had secured alternative employment within one week, awards compensation in the amount of €1,000.00.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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