

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO.UD515/2008
MN476/2008

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P McGrath

Members: Mr T O'Sullivan
Mr N Broughall

heard this claim at Dublin on 10th September 2008

Representation:

Claimant: Mr John Landy,
Canning Landy & Co., Solicitors, 4 Talbot Street, Dublin 1

Respondent: Mr. Breffni O'Neill,
Construction Industry Federation, Construction House, Canal Road, Dublin 6

The determination of the Tribunal was as follows:

Respondent's Case:

The owner and Managing Director (MD) of the respondent company, a building contractor, gave evidence. There was an incident on one of his sites on 6th December 2007 involving the claimant, a general labourer, and an agency employee. MD only became aware of it on Thursday of the following week. He instructed his foreman to suspend the claimant from the site the following day, for one day on full pay, so that the claimant could come to MD's office, with a union representative if he wished, and explain what had happened. He also instructed that the agency worker be sent back to the agency and not be allowed back. The claimant did not appear on the Friday and when MD contacted his foreman he was told that the claimant had returned to Ukraine for Christmas. He instructed his foreman to have the claimant report to the office on his return.

There was no contact from the claimant in January, and on 5th February 2008 MD received a letter from the claimant's solicitor, claiming that the claimant was still on suspension and seeking information relating to the incident of 6th December. MD responded on the 7th February that the suspension had been for the 14th December and requested that the claimant come to his office, with his solicitor if desired, to explain his version of events. On 8th February the claimant's solicitor requested statements regarding the incident to be forwarded to him, which

MD refused in a letter dated 11th February, as he had not yet spoken to his employee. MD confirmed that the suspension was for 14th December to allow the claimant to explain himself, and that the agency employee had been removed on 7th December. On 26th February MD received the claimant's statement from his solicitor. MD requested on 3rd March that the claimant come to his office. On 5th March the claimant's solicitor requested the witness statements and considered that the claimant was on suspension with full pay.

MD clarified all points in a letter dated 7th March, including that the suspension was for one day to allow the claimant to attend HQ and explain his version of events, and that he was currently absent without explanation. When the claimant's solicitor phoned MD on 18th March to tell him that the claimant would be returning to work the following day MD told him that the claimant must report to the office first.

The claimant came to MD's office on 31st March on his own and had no difficulty communicating with MD. MD had interviewed the claimant for the position on both times he had been hired by the company and understood his English to be sufficient. MD went through the statements relating to the incident with the claimant and asked why he had not come to the office as requested. The claimant stated that the foreman told him there was no work after Christmas. MD denied this as he had given specific instructions to his foreman. However, at this stage the investigation was irrelevant, as the two company sites were being wound down at Easter and only a small maintenance contract remained. There would have been a number of weeks available to the claimant after Christmas, but by the time the claimant came to see MD there was no work available. All of the company's 50 employees, bar three, were made redundant during that time.

MD explained to the claimant that there was no work available and that he had no option but to make the claimant redundant. The claimant asked if there was work available elsewhere, but MD explained there wasn't. The claimant was paid one-week's pay in lieu of notice.

Claimant's Case:

The claimant commenced his first employment with the respondent company in 2004 until he was made redundant in 2006. He was re-hired in 2006. The claimant believed that he had been suspended indefinitely from site rather than just for one day. He only found out that it was for one day when MD wrote to his solicitor on 7th March. He had not read the letter of 7th February as his solicitor had it.

On the day of the incident, 6th December 2007, the claimant was working with a bricklayer and was instructed to bring more cavity blocks. The claimant asked the forklift driver to bring them over from near the fence, but when he went there, there were none. The claimant went over and saw that two other employees were using the blocks to support a wall being constructed. The claimant told them that he needed the blocks as they were the only ones on site and they laughed at him. He began taking the blocks and replacing them with others. There was then a row between the claimant and one of the other employees, during which, the claimant was struck on the shoulder with a shovel. Other employees then intervened and the forklift driver, who was also the safety officer, reported the incident.

They were both called to the foreman's office to explain, but the claimant said very little and the foreman and the other worker, an agency employee, were chatting and laughing together. He told the foreman that his shoulder hurt and later went to hospital. He went on sick leave as he could not

lift anything and returned the following Wednesday, the other employee was not on site. During the week he asked the foreman if he could take six weeks off for Christmas as he had exams to take at home, which was agreed. Following tea break the foreman told him that he would have no more work. He wasn't told to go to the office on Friday. The foreman suggested going to the union, and then he might be restored to his job. However, the claimant believed that he couldn't go to a union because of the fight and because the foreman and the agency worker were friends. He was given nothing in writing nor was he asked to give anything in writing.

When he returned in January he didn't know what to do and he had no documentation, so he went to a solicitor. He went to MD's office at the end of March, as that was when he was told to do so, and they went through the statements about the incident. MD asked him what he wanted and he said his job. MD told him that there was no work left and that everything was finishing. The claimant believed that he was dismissed over the incident. He received his P45, payslip and one week's pay a week later.

Determination:

Having carefully considered the evidence adduced, the Tribunal finds that the claimant was ultimately dismissed by reason of a legitimate redundancy situation existing in the workplace. The uncontradicted evidence is that the sites which had been operational in December 2007 were closed by April 2008.

Having regard to the investigation being conducted into the incident of the 6th December, the Tribunal accepts that the claimant may not have understood that the suspension was purely for the purpose of the investigation. It is conceivable that he believed he had been dismissed. Even so, by letter on the 7th February the employer clarified that the suspension had only been meant for one day; a day on which the claimant was to have made himself available to make a statement and give his version of the incident. It is noted that at all times the claimant was invited to bring representation.

It still took the claimant a full seven weeks to make himself available for the purpose of the investigation. As it happens, in the same timeframe the workplace was being run-down and wholesale redundancies were being made.

The Tribunal accepts that the purpose of the investigation was overtaken by events and that the claimant was made redundant with notice in April 2008. Accordingly, the claims under the Unfair Dismissals Acts and Minimum Notice Act fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

