

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD357/2008

against

MN320/2008

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2003**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary

Members: Mr. D. Morrison
Mr. G. Hunter

heard this appeal at Letterkenny on 9 September 2008

Representation:

Claimant:

Mr. Frank Dorrian, P.A. Dorrian & Co. Solicitors,
St. Annes Court, Letterkenny, Co. Donegal

Respondent:

Ms. Nodlaig Brolly B.L. instructed by Ms. Margaret McGinley,
McGinley & Co. Solicitors, Milford, Co. Donegal

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make his case.

The claimant was employed as a painter from April 1999 firstly by the respondent's father and then from 2003 by the respondent who is a painting contractor. The work involved the painting of mainly new premises with a high proportion of the work being on housing developments. The employment was uneventful until the introduction of the smoking ban in the workplace in 2004. The claimant was one of a team of up to five people including the respondent and the respondent's father who carried out the work. The claimant was the only one of the five who did

not smoke. His position is that whilst he had no objection to his colleagues smoking whilst working outside he continually complained to the respondent and his colleagues about smoking taking place inside the various workplaces and in his presence. His position is that both his colleagues and especially the respondent treated his complaints with disdain. The respondent's position is that whilst accepting that smoking did take place inside the various workplaces the claimant never raised this as an issue with him.

The claimant was not provided with a written contract of employment or terms and conditions or any grievance and disciplinary procedures. The respondent's position was that he was not aware of the Registered Employment Agreement for the Construction Industry.

In the last few months of the employment the claimant was working with the respondent and another employee (AE) on a site some 70kms from home. The claimant's position, supported by AE, is that there was an agreement that travel to site was to be on the employer's time and travel back from site was to be on the employees' time and that the finishing time on site was to be 5-00pm. On 31 March 2008 a dispute arose between the claimant and AE on the one hand and the respondent over the finishing time. The respondent insisted that the agreed finishing time was to be 5-30pm. The claimant and AE left the site at 5-00pm and the claimant did not return to work citing both the respondent's failure to act on his complaints about smoking in the workplace and the employer's unilateral alteration of a term of his contract concerning working hours at the distant site. AE, who did return to work on 1 April 2008, told the respondent of his decision to also leave the employment. His decision was based solely on the unilateral alteration of a term of his contract concerning working hours at the distant site.

On 2 April 2008 the respondent wrote to the claimant setting out his dissatisfaction with the claimant in regard to leaving the site at 5-00pm and not attending work on both 1 & 2 April 2008. The letter further invited the claimant to submit his resignation if it was not his intention to return to work.

Determination:

Whilst the respondent denied that the claimant had ever complained about smoking in the workplace he did accept that smoking did occur in the workplace and he acknowledged that he had now told his employees not to smoke in the workplace but had not issued written notices about this issue. The Tribunal is satisfied that the claimant was unhappy about the breaches of the smoking control regulations and is further satisfied that he brought this to the attention of the respondent. The existence of a written contract of employment would have prevented the disagreement that took place over the site finishing time on 31 March 2008. Both the claimant and AE were as one in asserting that 5-00pm was the finishing time and, following the raising of this issue by the respondent, both of them left the employment. The Tribunal prefers the evidence of the employees on this matter and cannot accept that the agreed finishing time on the remote site was 5-30pm. For all these reasons the Tribunal determines that the claimant was entitled to consider himself constructively dismissed.

The Tribunal deems that the most appropriate remedy in this case is compensation, which accords with the preference of both parties. In considering the level of the award the Tribunal has assessed the loss based on the rate of pay laid down in the registered employment agreement for the construction industry. Having considered the claimant's lack of certainty concerning his attempts at mitigation of loss the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2001, at €7,200-00 . This being a case of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2003 does not arise.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)