

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD1002/2007, MN779/2007  
WT332/2007

Against

Employer

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Mr J. Hennessy  
Ms H. Kelleher

heard this claim at Clonmel on 12th September 2008

### **Representation:**

Claimant : Mr Stephen O'Sullivan B L instructed by  
J.A. Canny & Co., Solicitors, 44, Friary Street, Kilkenny, Co. Kilkenny

Respondent : Mr Conor O'Connell, Construction Industry Federation,  
Construction House, 4 Eastgate Avenue, Little Island, Cork

The determination of the Tribunal was as follows:

The appeal under the Organisation of Working Time Act, 1997 was withdrawn at the outset of this hearing. Since dismissal was in dispute the hearing opened with the claimant's case.

### **Claimant's Case**

The claimant worked for the respondent for several years and had a good relationship with its management. He undertook labouring and driving tasks on their sites. The witness had a safe pass or ticket for teleporter and digger driving duties. He did not have such necessary documentation to perform scaffolding work. Up to 5 June 2007 he was working on a modest development connected with the Clonmel Golf Club. During the course of that morning his digging duties ceased on that site and he was asked by the foreman to commence slabbing duties the following day. However that same morning one of the directors instructed him to work on a scaffolding job. When he protested at this that manager told him either to do that or go. The witness opted to do the latter, went home,

and secured similar work elsewhere within twenty-four hours.

The claimant phoned the relevant manager later that week and informed him of that development. He also told him that if the respondent had no further work for him then he wanted a redundancy payment. The manager objected to that application. The claimant acknowledged he received a letter from that manager dated 11 June 2007 in which the respondent stated that his job was still available and invited him to return to work. The witness was unwilling to do that on health and safety grounds. He accepted that the respondent never used the phrases dismissal or termination of employment as regards his work.

### **Respondent's Case**

The respondent is a modest sized construction company mainly engaged in the building of residential houses. Apart from its own employees it also commissions sub-contractors to undertake some of its tasks. The relevant director outlined the claimant's work record with the respondent. The witness stated that the claimant carried out a wide range of construction work on their sites. Such work was under the direction and instruction of the foreman of those sites and the witness did not directly direct the claimant's duties. He was aware that the claimant did not have a ticket for scaffolding and therefore he could not work on jobs involving such equipment. He never asked him to take on such work. Subcontractors on behalf of the respondent normally did scaffolding.

While on the site on 5 June 2007 the manager told the foreman to put the claimant on slabbing duties, as there was no immediate work available for digging. That afternoon he received a telephone call from the claimant saying he was not doing slabbing, as he was a full time driver. The manager replied stating that if the claimant wanted a fulltime driving job then he needed to go to another employer who could provide that work. The claimant did not report for work the next day and by Friday of that week he learned that the claimant had commenced work elsewhere. The witness responded to the claimant's application for a redundancy payment by telling him he had not been let go.

The witness insisted that the claimant was not dismissed and referred to a letter he sent him on 11 June informing him of that. He also commented that he never told the claimant to get off the site but did ask him to do what the foreman instructed.

### **Determination**

Based on the evidence in this case the Tribunal is unable to find that a dismissal took place. The claimant accepted that his employment was not formally terminated and relied on his own perception and meaning into the events of 5 June 2007. The respondent explicitly stated to the claimant that his job was still available and in the absence of a response within the stipulated time it was not unreasonable for the company to conclude that the claimant had abandoned his employment.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

