

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee

Case No.
UD728/2007

RP388/2007

MN591/2007
WT251/2007

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
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony BL

Members: Mr. P. Casey
Ms. H. Kelleher

heard this claim at Cork on 31st March 2008 and 11th July 2008

Representation:

Claimant: Mr. Donal Ryan B.L. instructed by Mr. Dan Murphy, Edward B.Carey & Co.,
Solicitors, 23 Marlboro Street, Cork

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

The determination of the Tribunal was as follows:

This is a claim for constructive

The Evidence:

The respondent own and runs a mechanical engineering business and is based in Town A. It is involved in metal fabrication, steel erection, pipe-laying, and installations as well as maintenance and repair in factories. The claimant commenced employment with the respondent in 1989 and having completed his apprenticeship as a metal fabricator there he continued in employment with the respondent. The respondent worked all over the country and the claimant travelled throughout the country working on customers' sites. The respondent's Personnel Manager/Contracts Manager(hereinafter Contracts Manager) assigned the claimant to the various

jobs. The claimant lives in a town about seventeen miles from Town A. The claimant was a good employee and the parties enjoyed a good working relationship. The claimant alleged that this relationship changed in 2005.

The claimant's evidence was that the respondent's policy changed in the latter years: he began to hire sub-contractors who paid lower rates to their employees and some of the respondent's existing employees were put on protective notice a number of times. During 2006 there were times when the claimant did not receive work for a period of days or a week and over February and March 2006 he did not receive work for approximately six weeks. During this time the respondent was giving the local jobs to subcontractors and the direct employees, including the claimant, were forced to work further away from home. On some jobs he spent two to three hours commuting each day. When the claimant was off for about six weeks, immediately prior to the termination of his employment relationship with the respondent, he heard that sub-contractors were doing the maintenance work during the shutdown there and he had previously done that. The claimant noted that throughout the course of his employment there was a drop in the number of employees working directly for the respondent and in some instances an employee was replaced with a sub-contractor.

The respondent denied favouring sub-contractors or that three named sub-contractors worked exclusively on local jobs, as alleged by the claimant. The respondent takes work where it gets it and does not switch employees from one site to another when work becomes available closer to an employee's home. Such a practice would not please the clients and would be unworkable in the respondent's business, which employed around 120 employees on a small number of sites. Travelling sixty to seventy miles to a job is regarded as local in the construction industry. The respondent did not pay travel and subsistence expenses to subcontractors; they take the job at a price. Employees are paid "country money". The respondent did not have work near to the claimant's home in latter years. The Contracts Manager believed that the claimant's dissatisfaction with the respondent started when he inherited a farm and wanted to work nearer to home so that he could also work on the farm. The respondent had given the claimant four or five weeks off over a two-year period to attend farming courses. The respondent allowed the claimant as much time off as he needed when his wife was ill but in the event he had only taken two and a half days off. Over the 28 years the respondent has been in business only ten to twelve employees had been made redundant.

The claimant had been working in Galmoy mines from mid September 2006. When the work there was coming to an end the claimant would not go to a job in Lagan Cement and rather than argue with him the Contracts Manager sent him to a job in Cork for a week after which he was sent to Lisheen mines for three weeks. The respondent felt that the claimant had not wanted to work in Lagan Cement because he wanted to work on his farm. The claimant had told him on a number of occasions that he did not want to work away from home because of the farm.

At lunch time one Wednesday in early to mid February, the foreman on the Lisheen mines job told the claimant that they would be finishing there that evening and that he should telephone the Contracts Manager about further work. It was the claimant's evidence that when he made contact the Contracts Manager told him that he would telephone him later that evening or the following day about a job but he failed to do so. The claimant telephoned him a number of times over the following working days but the Contracts Manager never returned his calls; on one of these calls the secretary told him that the Contracts Manager was on his mobile but he (the Contracts Manager) never called back. He eventually gave up calling him. It was the Contracts Manager's evidence that, within days of his finishing in Lisheen mines, he offered the claimant

work in Huntstown and that it was not until he received the worksheets the following week that the Contracts Manager realised that the claimant had not gone to Huntstown. He did not have any other work available at the time. The Contract Manager assumed that that reason the claimant turned down the offer of work in Huntsdown was because he did not want to be away from his farm. Apart from one call the Contracts Manager did not contact the claimant and said that this showed how lenient he was with the claimant but he had asked some of the claimant's fellow workers about his whereabouts. The Contracts Manager denied receiving several calls from the claimant about work. The claimant denied that he was offered ever offered a job in Huntsdown

Having been off work for a number of weeks the claimant went to the respondent's premises on 21 March 2007 to ask if he was entitled to redundancy. When he met the secretary she told him that the Contracts Manager had been looking to speak to him. The Contracts Manager enquired as to where he had been and gave him a letter, he had earlier prepared to send to him, remarking on his absence from work and asking him to make contact. The claimant informed him of his attempts to contact him and asked about redundancy. The Contracts Manager told him that he was not entitled to redundancy as he had work for him in Tara Mines. The claimant did not take up the offer of work in Tara because he felt that he had been "messed around" by the respondent and thought that he might get redundancy. The respondent sent a letter by swift post to the claimant later that day confirming the offer and giving him until Friday 26th March to accept the offer. The claimant did not accept this offer because too long a period of time had elapsed and he and he thought the respondent might pay redundancy if it wanted to get rid of him. The claimant did not have any further contact with the company after this time.

A former employee who had worked with the respondent for over twenty years gave evidence on behalf of the claimant. During his employment with the respondent 80% of his jobs were not on local sites. In February 2006 he attended for work and was told at 2.30pm that his employment was finished. The company paid him a redundancy lump sum later in 2006. The witness believed that the company replaced employees with sub-contractors who paid their employees at a lower rate. He subsequently worked for his brother who was a sub-contractor to the respondent. The witness confirmed that he worked all over the country when the respondent employed him. It was the Contracts Manager's evidence that the employee in question had worked for the respondent for a long number of years and then chose to work indirectly for the company under a sub-contractor who was his brother. The contracts Manager could not say why the claimant had only been paid for four days in the week ending 23 June 2006 or for only two days another week but speculated that perhaps the claimant was cutting silage.

Determination

The Tribunal finds that there was not a redundancy situation in the respondent's business in March 2007. The respondent had work available in Tara Mines on 21 March 2007 and offered that work to the claimant. The claimant turned down the offer on the grounds that he felt that he had been "messed around" and that he might get redundancy. It was not established to the satisfaction of the Tribunal that the claimant was "messed around" in that he was being deliberately denied local work so that sub-contractors could do it. It was a reasonable in the circumstances of the employer's business not to transfer employees from a job when one nearer to his home became available. The Tribunal accepts the Contracts Manager's evidence that since the claimant inherited a farm he no longer wanted to work any great distance from home. Having considered the evidence adduced the Tribunal finds that the claimant failed to discharge the onus of showing either that the respondent was guilty of a fundamental breach going to the root of the contract entitling him to treat his contract of employment as terminated or that the employer had acted in a manner that would make

it reasonable for him to terminate his contract of employment. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

As this was a constructive dismissal claim the claimant is not entitled to make a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

There was not a redundancy situation in the respondent company in March 2007. Accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2003, fails.

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

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)