

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD1295/2006
MN855/2006

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: Mr. J. Sheedy

Members: Mr. M. Forde
Mr. D. McEvoy

heard this claim at Cork on 16th October 2008 and 17th October 2008

Representation:

Claimant: Mr. Pearse Sreenan B.L. instructed by Mr. Martin Harvey, Martin A. Harvey & Co.,
Solicitors, Parliament House, 9/10 Georges Quay, Cork

Respondent: Mr. Tom Mallon B.L. instructed by Mr. Cian Beecher, Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

At the outset of the hearing the respondent's representative informed the Tribunal that due to the unavailability of a key witness, the respondent would not be adducing evidence to the Tribunal as to the fairness of the dismissal. The respondent did not apply for an adjournment of the hearing but acceded to the Tribunal's hearing evidence of the claimant's loss as a result of the dismissal.

Claimant's evidence of loss:

A list of the claimant's losses was opened to the Tribunal. Item 1 and 2 on this list pertained to unpaid travel expenses in the amount of €1,468.50.

Item 3 was the claimant's loss of €1,000.00 from a patent award which the claimant would have received in September 2006 had he not been dismissed by the respondent in June 2006.

Item 4 pertained to the claimant's loss of a health insurance benefit, which the respondent paid on

his behalf. The figure provided for this loss was €429.36. In addition to this, item 5 on the list pertained to a 'HSA' benefit, which provided cover for the claimant for day-to-day medical expenses. The figure provided for this was €108.30. In cross-examination it was established that the contribution to the HSA benefit was paid by both the employer and the employee.

Item 6 related to the claimant's loss of salary. The respondent summarily dismissed the claimant on the 16th June 2006. The claimant sought alternative employment through various means but was unsuccessful in securing new employment until some 25 weeks after his dismissal. However, the claimant had to re-locate to Serbia in order to commence this new employment. The figure provided for the claimant's loss of salary for the period of 25 weeks was €30,357.69.

Item 7 related to the claimant's loss of a stock purchase plan. The claimant does not have the option of this in his new employment. A figure was not advanced in relation to this loss.

Item 8 referred to the claimant's loss from a forced sale of stock options. As part of the claimant's terms of employment the claimant was forced to exercise his stock options within 30 days of the date of his dismissal and did so on the 12th July 2006 at \$13.91 per share realising a profit of €12,399.97. However, if for example he had sold them on the 26th October 2007 (post dismissal) he would have sold them at a price of \$35.38 per share thus realising a profit of €127,785.11. Thus as a result of the dismissal and the resulting forced sale of his stock options he was potentially at a loss of €115,385.14.

Item 9 of the claimant's losses pertained to his application for U.S. Permanent Residency. The claimant explained that there are three stages to this application. The claimant was in the third stage of the application process at the time of his dismissal. As the respondent was his company sponsor for this application the claimant could not complete the application without being in the respondent's employment. A financial figure relating to this loss was not advanced at the hearing.

Item 10 related to the claimant's loss of pension plan contributions up to the 26th October 2007 and the figure provided was €4,250.08.

The total figure of loss advanced by the claimant under the above headings was €148,936.97. This did include his loss from the lack of a share option plan in his new employment.

In cross-examination when it was put to the claimant that obtaining stock options in any year was at the discretion of the respondent, he recalled that he had not received them in 2005 but could not remember why. While he was not aware as to whether there was any such discretion on the part of the respondent he did not challenge the company on the matter in 2005.

Determination:

The Tribunal having considered the matter referred to Section 6 of the Unfair Dismissal Act, 1977 provides:

"In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal."

Applying this provision the Tribunal deems the dismissal to be unfair.

Having considered the evidence of the claimant's loss the Tribunal is allowing the loss suffered by him under the following headings: basic pay, health benefit, patent award scheme and pension and awards him compensation in the sum of €36,037.13.

Based on the evidence of the claimant as to the loss suffered, as a result of the forced sale of his stock options, the Tribunal determines that it was reasonable for the claimant to base the loss sustained on the basis of a date on which they were selling at a good price and accepting the price as of this date, the Tribunal finds that the claimant would have realised a profit 2.54 times greater than he did. Accordingly, the Tribunal awards the claimant €31,495.92 (€12,399.97 x 2.54).

Accordingly, the Tribunal awards the claimant a total gross award of €67,533.05 under the Unfair Dismissals Acts, 1977 to 2001.

As there was no evidence before the Tribunal to show that the dismissal was fair the Tribunal determines that the claimant was entitled to an award in the sum of €7,285.86 under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, (this amount being equivalent to six weeks' gross pay at €1,214.31).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)