

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD823/2008

RP698/2008

MN759/2008

WT336/2008

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. P. McGrath B.L.

Members: Mr. R. Murphy
Mr. O. Nulty

heard this claim at Drogheda on 22nd December 2008

Representation:

Claimant: Ms. Bríd O'Flaherty B.L. instructed by Ms. Anna Murphy, O'Reilly Thomas,
Solicitors, 8 North Quay, Drogheda, Co. Louth

Respondent: In person

The determination of the Tribunal was as follows:-

Respondent's case:

In sworn evidence, the owner of the respondent company (*hereinafter referred to as PS*) said that he received a telephone call informing him that the claimant was drunk while working on a machine. He had replied that if the claimant was drunk, he would have to be sent home. It was also reported that the claimant was aggressive and had not wanted to go home. It was a driver (*D*) who had gotten the claimant off the machine to take him home. However, the claimant had not gone home but had been taken to the pub.

PS had asked for the opinion of the people reporting the incident and they had said that the claimant was drunk. His drunkenness had become a health and safety issue, which could not be allowed. PS had not been in the quarry and so had not seen the claimant on the day of the incident.

That evening, PS and managers of the respondent company had a meeting in the office where it was decided that the conduct of the claimant could not continue. PS decided that the claimant had to be dismissed because there was no point in taking action after someone was killed.

In cross-examination, PS confirmed that he had relied on the word of quarry manager (A) and driver (D) that the claimant was intoxicated. He had not been present or witnessed the condition of the claimant nor had the claimant been breathalysed or examined. On the following Monday, the claimant had received a letter of dismissal.

Replying to the Tribunal, PS explained that between fifteen to seventeen people are employed in the quarry, a quarry manager, an office manager and drivers. Health and safety inspections are conducted once a month.

The claimant's condition was a regular pattern and quarry manager (T) had gotten on to him about it and had verbally warned him about drinking. These verbal warnings were recorded in a diary in the office but no record of them was put on the claimant's personnel file.

PS confirmed that he was working "up the road" in his other business on the day of the incident. When put to him that he could have come to the quarry, PS said that he had relied on others.

PS confirmed that he had made the decision to dismiss the claimant. At the time of the dismissal, no grievance or disciplinary procedures existed.

In her sworn evidence, the respondent's financial controller had been on a course on the day of the incident. She had received a telephone call from the office manager at the quarry asking for her opinion because the word was that the claimant was drunk on a machine. The financial controller had advised that the claimant be brought home.

That evening, PS and the respondent's managers had a meeting. The other drivers were asked what they knew about the claimant's condition. They had reported that the claimant had come in to work drunk and also that they had been bringing drink to him at lunchtime. Because health and safety inspections happened all of the time at the quarry, the decision was made to dismiss the claimant.

In cross-examination, the financial controller confirmed that she had not seen the claimant on the day of the incident because she had been on a course, nor had she met the claimant before. She was just asked for advice. Her advice was sought because it is sought on everything. Her attendance at the meeting had been as a manager.

Claimant's case

In his sworn evidence, the claimant worked for the respondent as a machine operator on a fifty-ton excavator. He had never had an accident in all of the years that he worked nor had he never received a warning from the PS.

On 15 April 2008, the day of his dismissal, the claimant had commenced work at 7.30am. He had started his machine and fed the crusher. The quarry manager had told him that another machine was being brought in to work in the quarry so the claimant had made a place for it at the quarry face. The quarry manager had wanted loose stone removed from the quarry face but the claimant had explained to him why this could not be done.

The claimant denied that he was drunk on the machine though he admitted that he may have had a few drinks on the previous night but he had not drunk that much. He also denied that he was aggressive while on the machine. He had been brought home and not to the pub.

The claimant realised that he had no job when he received the letter of dismissal on the following Monday. It was at this stage that he knew he had been dismissed. The following Thursday, he received his P45 form and holiday money that was due to him. However, he never received notice of the termination of his employment.

The claimant denied that other drivers had gotten drink for him or that he had ever drank while at work. He agreed that after work, he would have drunk a can of lager and had a sandwich.

The claimant established his loss for the Tribunal. He had been unable to secure alternative work due to the downturn and saw no future in the building trade. However, his intention is to get into market gardening and the growing of organic vegetables.

Replying to the Tribunal, the claimant confirmed that he took no action when he received the letter of dismissal but just accepted it.

Determination:

The Tribunal has carefully considered the evidence adduced. The claimant's employment was terminated for gross misconduct. The respondent had accepted third party information that the claimant has been drunk while in charge of machinery.

The Tribunal is satisfied that the dismissal was unfair in circumstances where the respondent made no effort to satisfy himself that gross misconduct had been committed and failed to follow a fair procedure in conducting an investigation. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the Tribunal awards the claimant the sum of €20,000.00.

The Tribunal dismissed the claims under the Redundancy Payments Acts, 1967 to 2003, the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and the Organisation of Working Time Act, 1997

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)