

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE **-claimant**

UD20/2009

MN27/2009

RP16/2009

against

EMPLOYER **-respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 AND 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S.C.

Members: Mr. C. McHugh
Mr. A. Butler

heard these claims at Wicklow on 1 July
and 18 November 2009

Representation:

Claimant:

Mr. Blazej Nowak, Emigrant Advice Centre,
19 Talbot Street, Dublin 1

Respondent:

Mr. Michael McNamee B.L. instructed by
Ms. Catriona Byrne, Catriona Byrne & Co. Solicitors,
3 Millbank, Blessington, Co. Wicklow

The determination of the Tribunal was as follows:

At the outset the claim under the Unfair Dismissals Acts, 1977 to 2007 was withdrawn.

The claimant was employed as a general operative in the respondent's landscaping business from April 2001. The employment was uneventful, with the claimant being highly regarded by the respondent, until some time in October 2008. At that time there was a discussion between the managing director (MD) of the respondent and the claimant about the claimant taking time off to return to his native Poland. It is common case that he had exhausted his annual leave entitlement at this stage.

The respondent's position is that the claimant requested one month's unpaid leave, which MD was

unwilling to agree to because of the claimant's relatively senior position in the respondent and his relative importance to the respondent having regard to the current state of work. The respondent agreed to the claimant taking two weeks' unpaid leave with the claimant to telephone MD after two weeks to confirm if he could stay away for a longer period.

The claimant's position is that he wanted to take two weeks' unpaid leave, to which the respondent agreed, but when he telephoned at the end of the two weeks MD told him that there was no work for him, possibly until after Christmas, and he should phone back in another week.

During a telephone conversation, on or about 14 November 2008, between the claimant and MD after the completion of the two weeks' leave the claimant mentioned the possibility of his seeking alternative employment. He had become aware of another employer (AE), of whom MD was not aware, providing similar work to that which he was doing for the respondent. The claimant began work for AE, his current employer, on 17 November 2008. The claimant's position is that this was, initially, a temporary arrangement until more work became available with the respondent.

Some time in early December 2008 the claimant telephoned MD to complain about his pay and conditions with AE. Shortly after this conversation AE telephoned MD seeking the claimant's P45 in order to regularise the claimant's tax situation. As a result MD contacted the claimant to seek his approval for the release of the P45. The respondent's position is that when the claimant was asked about the release of the P45 he replied, "Yeah, yeah, yeah". The P45 was issued showing the date of termination as 20 November 2008.

At its peak the respondent had around 50 employees, in October 2008 this number had shrunk to around 25 employees. On 20 November 2008 a number of employees were put on short-time working.

Determination

The claimant asserted throughout the hearing that he understood fully all the relevant conversations he had with MD throughout the latter part of 2008, which led to his ceasing to work for the respondent. All these conversations were conducted in English and there is a clear conflict of evidence about significant aspects of those conversations. At the Tribunal the claimant was afforded the services of an interpreter and gave his evidence in Polish. The Tribunal is satisfied that this left room for misunderstanding, on the part of the claimant, of the content of his conversations with MD. The Tribunal accepts the evidence of MD and finds that there was no dismissal, for redundancy or any other reason, rather the claimant, for whatever reason, resigned from the employ of the respondent when he went to work for AE on 17 November 2008. In such circumstances claims under both the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Redundancy Payments Acts, 1967 to 2007 do not arise

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)