

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD426/2008 RP352/2008
MN386/2008

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**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly BL

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard these claims in Letterkenny on 4 November 2008

Representation:

Claimant(s) :

Mr. Garry Clarke, Garry Clarke, Solicitors,
McKendrick Place, Letterkenny, Co. Donegal

Respondent(s) :

Mr. Kieran O'Gorman, O'Gorman Cunningham & Co, Solicitors,
16 Upper Main Street, Letterkenny, Co. Donegal

The determination of the Tribunal was as follows:-

The claim was that the claimant, having been involved in a work-related accident on 18 January 2008, received two text messages on 29 March 2008 from the respondent's son (JOD). The first of these was alleged to say that the claimant could stay on sick leave because: work was not very busy; there were nearly too many there as it was; one man was "getting road"; and the weather was "that bad too". The second was alleged to be a request to the claimant to let JOD know if the claimant was not coming back because JOD would give the claimant a few weeks' wages and JOD did not want any bad feelings.

The claimant felt that he had been unfairly dismissed and that, if he was made redundant, he did not receive his proper redundancy payment. He added that he had received no documentation from the respondent.

The defence was that the claimant's employment had not finished as stated by him. The claimant went off work on 18 January 2008 due to sickness and, during this time, he received full wages and, the respondent understood, sickness benefit. The claimant called to the respondent's house and spoke to the respondent on 16 March 2008. The claimant stated that he was all clear to come back to work and that he would be starting back to work on Easter Tuesday i.e. 25 March 2008. However, the claimant did not report for work and the respondent was told that the claimant had texted JOD saying that he had got another job and that he required his P45 and holiday pay. When JOD asked the claimant if he wished to speak to the respondent the claimant said that he did not.

The respondent submitted that he had not dismissed the claimant and, indeed, that he would have been in a position to have the claimant work as agreed if he had returned on Tuesday 25 March 2008.

In a submission, the claimant's representative stated that the claimant, having had a site accident on 18 January 2008, had not been able to work but that, when the claimant felt able to go back, he tried to contact the respondent. On 29 March 2008 he was told that he would not be taken back. The last date he worked was 18 January 2008. The claimant had got a cash envelope for €450.00 every week but had never got a payslip.

In response, the respondent's representative stated that the gross pay of roughly €600.00 had been on the P60 every year and that it had been like that for about six years. He said that there was a total conflict and submitted that the claimant had neither been dismissed nor made redundant. There had been a 16 March 2008 meeting with the respondent about returning to work on 25 March 2008. The claimant did not report to work that day. The work was there. The respondent had to replace the claimant two weeks later. The only contact with the respondent had been on 16 March 2008 about returning on 25 March 2008. It was arranged then but the claimant did not return. JOD just worked for the respondent like the claimant. The respondent was a small contractor.

Giving sworn testimony, the claimant said that had been with the respondent for seven years but had stopped after 18 January 2008. He had got no contract nor terms and conditions when he started. He got no P60s or P45. He got no wageslip. He got €450.00 after tax. He received this in cash on Fridays. He said that this day of the Tribunal hearing was the first he had heard of €600.00 gross.

Regarding his 18 January 2008 accident, the claimant said that he had been working on site lifting shutters, that it was windy and rainy and that he had had an accident. He heard nothing from the respondent after the accident. He got that week's wages. The respondent's son took the claimant's van and dropped off the claimant's wages. He got one more payment pushed through his letterbox. He was not fit to go back but he did intend to go back.

The claimant felt fit to return when he met the respondent on 16 March 2008. There had been no contact between January and March. The claimant called out to talk to the respondent. The claimant

told the Tribunal that he “was a bit nervous about going back on sites” but that he was to go back on 25 March 2008. When 25 March came the claimant did not feel fit. He had a very sore head. He did not contact the respondent. He just sent a text to JOD asking if there was work there. JOD said that it was up to the claimant. The claimant did not feel up to it.

The claimant now read out the texts as contained on his claim form to the Tribunal. He said that the messages were now all deleted, that he did not know what he had replied and that he had thought that he was finished with the respondent.

The claimant told the Tribunal that he would not have gone anywhere if he had stayed with the respondent. He started a new job on 31 March 2008 but on 24 April 2008 he stopped. He was let go. He started another job on 21 May 2008 and worked at that for two months but was let go because work was slack. He was now unemployed and not able to get work.

Under cross-examination, the claimant said that there had been no problems up to 18 January 2008, that he had got to know JOD quite well and that he and JOD texted each other.

The claimant told the Tribunal that he was suing the respondent for personal injury, that there were proceedings up and running and that this made him apprehensive about working for the respondent. While “off on the sick” he did not contact the respondent but on 16 March 2008 the claimant called to see him. The respondent had said that he would call to the claimant’s home but did not do so. On 16 March 2008 the respondent said that, if fit to go back, the claimant could go back on 25 March 2008. The claimant was nervous. The respondent did not suggest that the claimant’s job was not there. That was the last conversation that the claimant had had with the respondent. The respondent had never said at any time that the claimant would be redundant or was being dismissed. Asked to confirm to the Tribunal that he admitted this, the claimant did not reply.

Asked to confirm that he had been nervous because of his legal case, the claimant said that he had been. Asked to confirm that the respondent had wanted him back on 25 March 2008, the claimant accepted this. Asked how he had been made redundant or dismissed, the claimant said that he had not thought that he was redundant or dismissed. He confirmed that he had been nervous about the court case.

The claimant told the Tribunal that he had said to the respondent that he might be back on 25 March 2008. It was now put to him that he had no intention of going back to the respondent and he was asked if he had said this to the respondent. The claimant said that in the couple of days around 16 March 2008 he had been on to a new contractor. The claimant was now asked if he had told the respondent that he was not going back and it was put to him that he had left. He did not reply apart from saying that he had started work in Ballybofey on 31 March 2008.

Asked when did he say that he had been dismissed or entitled to redundancy, the claimant merely replied that he was so entitled.

Questioned by the Tribunal, the claimant replied: “I think I was dismissed after the eighteenth of January accident. I did not feel confident. Nobody dismissed me really. I did not feel I could continue.” Regarding 16 March 2008, the claimant said that the respondent’s wife had said that the respondent would come down to him but that the respondent had not done so. The claimant did,

however, acknowledge that the respondent had wanted the claimant back on 25 March 2008.

Asked if the claimant's solicitor had told the respondent not to contact the claimant, the claimant acknowledged this. Asked to accept that the respondent had done all he could get the claimant back, the claimant accepted this. Asked what then was everyone doing at a Tribunal hearing, the claimant did not reply.

Asked if he had not needed a P60 for his mortgage and asked how he had proved his pay to the mortgage company, the claimant replied that his wife had done that, that she had done "all the tax" and that he had known that he was getting a net wage. Asked to confirm that on 18 January 2008 he had decided not to go back, the claimant replied: "Yeah."

Questioned by the Tribunal, the claimant said that he had not been sure if his job was still there after the accident and that his phone had fallen into water.

The claimant was referred to the two text messages which were alleged to be material to his case and was asked what had made him think that his employment was being terminated. The claimant replied: "Maybe my job was not there."

The claimant told the Tribunal that the conversation on 16 March 2008 had been a friendly conversation, that he had not been sure as to when he could go back and that he had still felt that the respondent would be upset because the claimant had taken a case against him. Asked how he had thought that he was being made redundant or dismissed, the claimant did not reply.

In re-examination, the claimant was asked if no-one had contacted him to talk. Confirming this, the claimant said: "I was concerned about being on site and not being able to carry out my job. I was nervous about working on site. I was not sure what my position was. I was very worried."

The claimant's representative said to the Tribunal that he had never rung the respondent but that the respondent had rung him.

Giving sworn testimony, the respondent said that he had never tried to dismiss the claimant or make him redundant and that the respondent's insurance company was dealing with the claimant. The respondent said that, on 16 March 2008, the claimant had called to the respondent's home and said that he was ready to go back whereupon the respondent had said to go back on Easter Tuesday (25 March 2008). The respondent "was happy enough". The claimant had been a friend of his for years and the respondent's son was friendly with the claimant.

The week after Easter the claimant had not turned up for work. The respondent thought the claimant might still come back. He had heard that the claimant was going. He went to the claimant's house. The claimant was not there. The claimant's wife said that the claimant had been sacked. This was about two or three weeks after Easter. The respondent told the claimant's wife that the claimant was not sacked. She was shocked. She said that the claimant had told her that he had been sacked. The respondent said to her to tell the claimant to contact him. The respondent and the claimant's solicitor talked. The claimant's solicitor said that the claimant did not want to talk to the respondent and that the respondent was not to contact the claimant again. The respondent told

the Tribunal that the claimant could have gone back at any time.

Under cross-examination, the respondent admitted that he had never given the claimant a contract, saying that there was work there and that the claimant knew what had to be done.

When it was put to the respondent that the claimant did not know his rights and obligations, the respondent replied: "Everybody knows. He worked from half-past eight to half-past five. Overtime was paid if somebody stayed longer. He got paid for holidays each year."

Asked what was the procedure if the claimant had a dispute with the respondent, the respondent replied: "He could talk to me. I was willing to talk to all employees."

The respondent admitted that he did not pay for sick leave but said that he had given the claimant six weeks' pay from 18 January 2008 i.e. four weeks before 16 March 2008 and two more with the claimant's P45.

The respondent said that his accountant did all the deductions and gave him a P60 at the end of the year. Regarding the figure of €600.00 that had been mentioned as the claimant's gross weekly pay, the respondent said that it might have been €550.00 but that it was €450.00 net and that the respondent had paid the tax.

Asked if he had given payslips, the respondent replied: "He got P60s. I don't do payslips. My accountant won't come in. He's too busy." Suggesting that the claimant's representative ring his own office, the respondent said that he had given the claimant a P60, that the accountant worked it out and that the respondent had no P60s with him.

The respondent added that the claimant had been a friend of his and that he (the respondent) had been doing the claimant a favour by giving the claimant payment for the claimant's time off. The respondent said: "I'll declare this on the books at the end of the year."

The respondent told the Tribunal that he had rung the claimant shortly after the accident (at which the claimant interjected that there had been one phonecall). The respondent continued that the claimant had been off for many weeks in the last year and that he (the respondent) had made sure that the claimant had lost nothing as a result of the accident. The respondent said that he had known what the claimant had been "getting on the sick" and that, knowing that the claimant would be down from €450.00 to €180.00, he (the respondent) had felt that he would make up the claimant's wages so that the claimant "would not lose money".

The respondent told the Tribunal that he had not spoken to the claimant until 16 March 2008. Asked if he had explained after the accident, the respondent replied: "No. I didn't need to explain. He got two weeks' pay with his P45. It was not holidays because he was not due holidays."

It was put to the respondent that the claimant said that he only received one payment of €450.00 pushed through his letterbox. The respondent then showed a written record of four separate payments of €450.00 made to the claimant.

Questioned by the Tribunal, the respondent said that the claimant had been paid €450.00 but that, after four weeks, he would stop giving it to him and that he had been expecting the claimant back

after about six weeks. The respondent added that the claimant would have to wait three or four weeks “before getting sick money” and that the claimant had had weeks off sick beforehand. The respondent said: “I paid him €450.00 for (each of) four weeks because it takes time for sick money to come through. He is bright enough to work this out for himself. Two weeks after the 25/26 March I got the personal injury notice.”

The respondent told the Tribunal that there had been no discussion with the claimant about taking a case until the respondent had got a letter from the claimant’s representative. It was now put to the respondent that, in that event, when the claimant had felt nervous about returning, the claimant had not brought the action. The respondent replied: “No. He hadn’t.”

The respondent stated that he had not given the claimant paperwork and that the texts had been between his son (JOD) and the claimant. The respondent said: “They are very good mates. They could text each other even when on the same job. I was not nervous about the personal injury claim.”

It was put to the respondent that he had called to the claimant’s house and offered money to settle the case. The respondent replied: “I said if he wanted to settle for five thousand euro I’d give it. I have to pay the first part of a claim.”

At this point in the Tribunal hearing, the respondent’s representative objected saying that this was after the claimant had left and that the personal injury action had no relevance because the claimant had gone.

Under further cross-examination, the respondent said that he had not rung about the claim against him, that anybody who got hurt was entitled to compensation and that the claimant had always come to the respondent’s home when the claimant had needed to do so.

The respondent said that he and the claimant were friends and remained friendly. He added: “On 16 March he was not going to another job. If somebody wants to leave let them go. I told his wife the job was still there if he wanted. I’ve nothing against him. I don’t know anything about texts between him and my son. Probably, it would have been discussed with the son (the texts with the claimant). Probably when I heard he (the claimant) was looking for his P45 I thought he was going. The job would have been there for him if he wanted to come back. You (the claimant’s representative) told me he did not want to speak to me. I don’t know when money was offered. Your office probably has dates. Your office rang me.”

When the respondent’s representative told the Tribunal that he did not feel the need to call the respondent’s son (JOD) to give evidence, the claimant’s representative asked if the texts were confirmed. The respondent’s representative replied that they were not disputed.

Determination:

The Tribunal determined that the job was available to the claimant from 16 March 2008 and that the respondent had not terminated the claimant's employment. Therefore, the claimant did not make out a case and his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

As the Tribunal found that the respondent did not terminate the claimant's employment the claims lodged under the Redundancy Payments Acts, 1967 to 2003, and under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

