

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

Employee

- claimant

**CASE NO.**

UD697/08

MN634/08

WT286/08

against

Employer - respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr P. O'Leary BL

Members: Mr D. Morrison  
Ms R. Kerrigan

heard this claim at Letterkenny on 19th December 2008

Representation:

Claimant: Mr. Sean Mc Glynn, Solicitors, Church Street, Letterkenny, Co. Donegal

Respondent: Gibson & Kelly, Solicitors, Port Road, Letterkenny, Co Donegal

The determination of the Tribunal was as follows:-

### **Respondent's Case**

A director gave evidence on behalf of the respondent. The claimant was originally employed as a pool manager to oversee all the respondent's contracts, after two months it was clear that the claimant could not undertake this role. The respondent employed another manager and retained the claimant as a pool engineer. He confirmed that no contract of employment was issued to the claimant.

On the 31<sup>st</sup> October 2007 he received a phone call from his manager informing him that the claimant was refusing to travel to Omagh. He telephoned the claimant to ask for an explanation, the claimant told him it was too late in the day to travel. As a result of this he issued the claimant with a verbal warning. He recalled that the claimant had been sent to service a hotel pool and while there he advised them that their dosing system was no good, this resulted in the respondent subsequently losing their contract with this client. On another occasion in February 2008 the claimant drove to Ballybofey in the company's van for a routine call. He returned to the respondent's premises at 5.00pm and parked the van. Another employee got in to the van at 6.00pm and discovered that the engine was completely burnt out. He spoke to

the claimant the next morning who denied all knowledge of the engine.

On the 5<sup>th</sup> March 2008 he was away from the office and he received a call from one of his employees who informed him that the claimant had left the premises to cash his cheques but they were waiting on the delivery of four hundred blocks. All employees were instructed to give a hand with this delivery. He rang the claimant and asked him to return to the workplace. The claimant returned to the showrooms threw his work phone on the desk and said he was away and walked out. He did not hear anything from the claimant till the 19<sup>th</sup> March 2008 when he received a phone from him asking if he could return to work. During this period he had employed a replacement. He met with the claimant on the 20<sup>th</sup> March 2008 and informed him that he could give him two weeks work. He kept the claimant on for longer while explaining to him that it was on a temporary basis and that if work was slack he would have to make him redundant.

Previously the claimant had requested Friday the 13<sup>th</sup> June 2008 off. On the Thursday 12<sup>th</sup> he told the manager to tell the respondent that he was taking off the following week. The manager informed this witness and he asked him to tell the claimant it was not adequate notice and he could not take the following week off. The claimant did not report for work that week and as they were so busy the respondent had to take a temporary worker on to cover. The claimant returned to work on Monday 23<sup>rd</sup> June 2008 and went straight to a job on site. He did not get a chance to talk to the claimant that day, as they were so busy on site. The next day he spoke with the claimant and asked him as to why he had taken the previous week off without permission. The claimant had replied because he wanted to. He informed the claimant that it was not working out, that he had taken him back temporarily and could he please leave.

Under cross-examination he confirmed he had not issued the claimant with terms and conditions of employment nor any grievance procedure. Employees were responsible for completing their own timesheets but the claimant appeared to be too lazy to complete his. The manager had no knowledge of this holiday leave and had told him not to take the week off. When employees booked leave they are asked to give at least one weeks notice. When the claimant had returned from this week off, the claimant did not approach him on the Monday with an explanation for his absence. He did not think it was appropriate to speak with the claimant regarding his absence on site. When it became apparent that the claimant was not coming in to work on Monday 16<sup>th</sup> June he had tried to contact him on his work and personal phone but the claimant did not bother answering. He did not call to the claimant's house to seek an explanation for his absence even though it was just down the road from his business.

It was put to him that the claimant would say that he had got angry with him on the 5<sup>th</sup> March 2008 in relation to a steam generator and that's why he had walked out. He reiterated that he had rang the claimant to return to work that day to help with the blocks, he was not there when the claimant had walked out. The manager had met the claimant afterwards and had given him his wages, his P45 was to issue at this time. The claimant had asked him for his job back and he had given two weeks work, which had progressed to three months. In hindsight he should have written to the claimant informing him that this was on a temporary basis and an entirely new contract. He had issued the claimant with warnings over the course of his employment but these were all verbal.

In replying to questions from the Tribunal the witness explained when he dismissed the claimant in June 2008, he had replied fine and just walked out. He had not paid the claimant minimum notice as he did not think he was entitled to it. In relation to the warnings issued, he had no disciplinary procedure in place at this time but he had noted them.

### **Claimant's case**

The claimant gave evidence that he had commenced employment with the respondent in February 2007. Sometimes he found the respondent to be a hard spoken man, and you would not know whether you had received a warning. He never knew that his job was in jeopardy.

On the 5<sup>th</sup> March 2008 before he left to go and cash his cheques, the supplier of the blocks had rang the office manager to say the delivery was going to be late. On his way the respondent rang him and told him to go back. When he arrived the blocks were not there, he got annoyed waiting around and went home. He did not return to work, as the phone call had got to him. The respondent was angry and swearing at him, and he did not want to work for a man who was going to talk to him like that. He thought if he left things for a while things might settle. The respondent rang him on the 19<sup>th</sup> March 2008 and asked him to call down to him for a chat. He met with him on the 20<sup>th</sup> and the respondent asked him to return to work. The respondent never told him that it was on a temporary basis.

From his return to June 2008 he got on fine in work, he did not recall any complaints from the respondent in this period. He told the office manager on Friday the 6<sup>th</sup> June that he was planning to take the week commencing 16<sup>th</sup> June 2008 off; she did not raise any problems with this. On Thursday 12<sup>th</sup> June 2008 he was working with the manager and asked him to collect his wages as he was off the following day as planned. The manager never spoke to him in respect of the following week in which he was on holidays. During this week he never received or missed any telephone calls from the respondent. He returned to work on the 23<sup>rd</sup> June 2008 and the respondent never mentioned his absence to him. The following day when he arrived in work, the respondent asked where he had been the previous week. The respondent then told him that he no longer was employed with him.

He revisited incidents that arose in the respondent's evidence. He denied refusing to travel to Omagh and could not recall this at all. In relation to the van, the engine always gave bother, but it did not overheat while he was driving it. In respect of telling the hotel that the system they had was no good, he admitted he did talk about it but it was not his job to advise them whether it was right or wrong.

Under cross-examination he explained that the respondent have never told him he was issuing him with a warning. When things would go wrong the respondent would give out to him but he never told him his job was under threat. When he left the respondent's premises on the 5<sup>th</sup> March 2008, he took his toolbox but left behind the company's mobile phone. He reiterated that he did not receive any calls from the respondent during his week off. He denied that he had rang the respondent in March seeking to return to work, that it was the respondent that rang him. He was not required to work the week he had taken off, as they were building a log cabin and he was an electrical engineer by trade. In relation to the hotel pool he had spoken with the leisure centre staff that day and did say that the system was no good.

He gave evidence of loss to the Tribunal.

### **Determination**

The Tribunal considered the evidence in this case and noted that the claimant had resigned from his employment on the 5<sup>th</sup> March 2008. He stated that he resigned because of the language used to him by his employer. Based on the evidence, it appears that the claimant either requested his job back on the 19<sup>th</sup> March 2008 or was asked to return to work on that date, but in either case he resumed

his employment on 19<sup>th</sup> March 2008. The tribunal note section 1 of the UD Act 1977, where it defines dismissal, subsection (b) states:

*The termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer, or*

This entitles an employee to claim constructive dismissal by an employer in circumstances where the employee deems the conduct of the employer to be such that that employee could no longer work for that employer. In this case the employee returned to the employment of the employer thereby showing that he did not consider the actions of the employer in this case to be such that he could no longer work for that employer. This renders the break in his service to have been caused by his own resignation without justification. The Tribunal also considered the implications of the Unfair Dismissals (Amendment) Act, 1993, Section (5):

*Notwithstanding subsection (4) of this section, the dismissal (not being a dismissal referred to in the proviso (inserted by the [Unfair Dismissals \(Amendment\) Act, 1993](#) ) to subsection (2) of this section) of an employee followed by his re-employment by the same employer not later than 26 weeks after the dismissal shall not operate to break the continuity of service of the employee with the employer if the dismissal was wholly or partly for or was connected with the purpose of the avoidance of liability under this Act."*

This requires that the claimant be dismissed by the employer, which was not the facts in this case. The claimant had only three months service with the employer subsequent to 19<sup>th</sup> March 2008. In the circumstances the Tribunal must hold that the claimant did not have the requisite service with the employer to bring a claim of unfair dismissal and the Tribunal must refuse jurisdiction in the case. Therefore the claim fails.

The Tribunal awards the claimant €600.00, being one weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

The Tribunal has no jurisdiction to hear the claim under the Organisation of Working Time Act 1997 as a claim under the Payment of Wages Act, 1991 addressing the same issues is currently with the Right Commissioners.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_

(CHAIRMAN)

