

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee -**Claimant**

UD8/2008  
RP13/2008

MN7/2008

WT2/2008

against

Employer -**Respondent**

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. K. T. O'Mahony B.L.

Members: Ms M. Sweeney  
Mr J. McDonnell

heard this claim at Cork on 23 July 2008  
and 6 February 2009

Representation:

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Claimant:

Mr Brendan Kelly, B.L., instructed by  
Mr. Martin A Harvey, Martin A Harvey & Co, Solicitors  
Parliament House, 9/10 Georges Quay, Cork

Respondent:

Mr Eoin Clifford, B.L., instructed by  
Mr. Kevin O'Meara, David J O'Meara & Son, Solicitors,  
Bank Place, Mallow, Co. Cork

The determination of the Tribunal was as follows: -

The respondent was in the business of hiring out machines such as diggers and dumpers. The claimant commenced with the respondent on 9 October 2000.

In June 2007 the respondent went into examinership. During the examinership a company with almost an identical business (Company A), became interested in the respondent and on the basis of a due diligence, carried out on its behalf, it bought the respondent when the examinership ended in September 2007. According to the due diligence report the annual turnover for 10 months to the end of October was €1.9 million. Following the purchase the financial controller carried out his own internal audit of the respondent company and established that the weekly turnover was €18,000 and the weekly wage bill was €12,000. These figures drove a review of the respondent's workforce. At the time of the purchase, the respondent had 19 employees and a fleet of 124 machines and the claimant was the manager of the maintenance division with four mechanics reporting to him. The claimant also worked on hire control, phone bookings, counter sales, and quotations. It was the respondent's case that three other employees performed these tasks as well and the claimant only performed them on an ad hoc basis. It was the claimant's evidence that the latter duties accounted for the greater part of his duties. At any one time only 12–15 machines were out on hire. The respondent was raising about 12 hire contracts per day and 5 of these were non-deliveries.

Arising from this review it was decided that the operations manager of Company A who was responsible for maintenance there could, as well as maintaining his duties in Company A, also undertake the claimant's duties as maintenance manager in the respondent. The claimant's other duties were assigned to the 3 employees who already were performing those duties. On this basis the claimant and 3 other employees were made redundant on 19 October 2007. It was the claimant's evidence that he had been told at his dismissal that if things picked up they would be looking for someone again in the near future; this was denied by the respondent. By this time, as a result of the redundancies and resignations the workforce was reduced to 10 employees, excluding the operations manager, who worked out of Company A.

Company A provided the option to hire or buy and was generating over 3 times as much income with 12 employees as the respondent had been with 19 employees and a decision was taken that the respondent would diversify into sales. As a result, an advertisement was placed on 9 November 2007 for a sales representative, artic truck drivers and hire controller. As a result of the advertisement a hire controller/counter sales person was taken on but he resigned after some two months and was not replaced. A lorry driver resigned shortly after the redundancies and was replaced. This replacement driver was with the respondent for four weeks before he too left and was replaced. The claimant's position was that he had a licence to drive an articulated truck and had performed all these tasks but he had not been considered for these positions. The respondent's position was that the claimant had neither applied for the positions nor ever made it known that he had an articulated truck licence; had he applied, his application would have been considered. The respondent's evidence was that the claimant commenced working, for the former owner of the

business, immediately following his redundancy; this was denied by the claimant who told the Tribunal that he was just helping out. At the time of the hearing the respondent had only 5 employees and the maintenance division was operating solely out of Company A.

**Determination**

The Tribunal is satisfied that there were serious difficulties in the respondent's business. It accepts the respondent's evidence that the claimant spent the most of his time on his duties as maintenance manager and that this function could be carried out by the operations manager of Company A. Accordingly, the decision to declare the claimant's position redundant was reasonable. The Tribunal went on to consider the fact that some three weeks after the claimant was made redundant the respondent placed an advertisement in the local newspaper seeking to fill a number of positions. These positions became available as result of the respondent's change of business focus to sales and a truck driver's resignation subsequent to the redundancies. The claimant had never brought the fact that he had an artic licence to the respondent's attention, the respondent had seen the claimant at work with his former employer immediately following his dismissal by reason of redundancy and the claimant had not replied to the advertisement. In the circumstances, the respondent's failure to offer any of those positions to the claimant was not unreasonable and his selection for redundancy was not unfair. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

No evidence was adduced in regard to the claim under the Organisation of Working Time Act, 1997. Accordingly, this claim is dismissed.

The claims under both the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2001, were withdrawn as the claimant had received his statutory entitlements under those Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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