

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

– *claimant*

CASE NO.

RP845/2008

UD970/2008

WT403/2008

MN912/2008

against

Employer

- *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr. M. Flood  
Ms M. Maher

heard this claim at Dublin on 7th January 2009

Representation:

\_\_\_\_\_

Claimant(s) :

Hughes & Liddy, Solicitors, 2 Upper Fitzwilliam Street,  
Dublin 2

Respondent(s) :

No representation listed

The determination of the Tribunal was as follows:-

### **Claimant's Case**

The claimant gave evidence that he commenced employment with the respondent on the 23<sup>rd</sup> January 2006 as an architectural draughtsman. His duties included preparing plans, drawings for planning permission and designing new buildings. During the course of his employment he did not receive a payslip or a P 60.

In May 2008 he wanted to travel to Spain, as his father was not well. His plan was to travel to Spain where he would work for two weeks from there for the respondent and then take an additional two weeks holidays there. The respondent agreed with his plan and would send him drawings through the internet. He left work on the 10<sup>th</sup> July 2008 and flew to Spain on the 14<sup>th</sup> July 2008 and was to return to Dublin on the 11<sup>th</sup> August 2008, copies of the confirmation of his flights were produced. However following on from a discussion he had with the respondent before he left he was aware that his employer expected him back on the 31<sup>st</sup> July 2008. When leaving the office his employer had asked him “are you coming back on the 31<sup>st</sup> July” he had replied yes, thinking that he could change his flights or call him later.

He did not change his flight as his father was not well and he could not return on the 31<sup>st</sup> July 2008, nor did he return on the 11<sup>th</sup> August 2008 as his father asked him to stay on. He tried to contact his employer on the 11<sup>th</sup> August but he received no answer from his mobile. He spoke to his employer’s mother in law and asked her to inform the employer that he could not return on that day. He emailed his employer on the 12<sup>th</sup> August but received no response and at 5.00pm that day he spoke to the respondent’s wife and explained to her that he had tried to contact the respondent and that his father had asked him to stay on, she had replied that there was no problem but her husband would probably wish to speak to him.

His email of the 12<sup>th</sup> August was read in to evidence in which he explains that he was unable to get the flight on the 11<sup>th</sup> as his father was ill and that he had moved his flight to the 20<sup>th</sup> August and he apologises for the inconvenience. He did not receive a response to this email nor did he receive or do any more work for the respondent in this period.

His return flight was booked for the 20<sup>th</sup> August 2008, he rang the respondent on the 19<sup>th</sup> August to confirm with him he would be returning to work. The respondent told him he had no more work or any money to pay him. He rang back again and asked him if it was because of the delay in him returning from Spain the respondent told him again he had no money to pay him however there might be a possibility he would send work to him in Spain and would ring him later that day to confirm this. He heard nothing after this and did not contact the respondent till his email of the 26<sup>th</sup> August 2008, in which he requested a dismissal letter, his P45 and a reference. He received no response to this. He wrote by letter to the respondent on the 4<sup>th</sup> September 2008 reiterating his request of the 26<sup>th</sup> August. He gave evidence of loss to the Tribunal.

Under cross examination the respondent told the claimant that it had been his clear understanding that he would work for one week in Spain and then take two weeks holidays and return to work on the 31<sup>st</sup> July 2008. The claimant had taken one plan with him to work on these were new apartments, he said that the respondent had told him not to do anything further on these till he heard more from him. He confirmed that he was still in Spain when he had spoken with the respondent on the 19<sup>th</sup> August and the respondent had said he had no more work or money for him.

The respondent raised a number of absences and lates that had occurred over the course of the claimant’s employment by using a record of text’s he had received from him. The respondent explained that he had no issue with the quality of the claimant’s work but was introducing these to show that the claimant had been unreliable. The claimant explained that he easily got sick because of an existing ear condition and that his doctor was based in Blanchardstown so he would have missed work because of this. A number of dates in relation to the texts were raised the claimant could not recall as to why he was absent for some of them, however he stated that at no stage during the course of his employment had he received any warnings in respect of absences or lates.

He always informed his employer of when he was going to be late or absence and had provided him with sick certs. He confirmed he received his P45 through his solicitor about four months later.

### **Respondent's Case**

The respondent explained that the claimant commenced employment with him on the 20<sup>th</sup> January 2006, he was aware that he was slightly deaf in the left ear so the claimant sat to his right in the office. The claimant's first year went well but occasionally he would be missing for a day. He recalled that the claimant did not turn up to work on the 2<sup>nd</sup> January 2007 and did not return until the 7<sup>th</sup> January 2007. He asked the claimant that if this was to happen again to let him have notice of this. The claimant had told him his father was not well and he asked him if he could take two weeks holidays and work one from Spain. The respondent expected the claimant to return on the 31<sup>st</sup> July 2008. His wife informed him that he would be returning on the 12<sup>th</sup> August 2008.

Recalling the telephone conversation he had with the claimant on the 19<sup>th</sup> August it had not been clear from this when the claimant was returning. The drawing he had sent by email to the claimant while in Spain had not worked out well, though it had been done it had been returned late and their client had not been happy. He explained to the claimant on the 19<sup>th</sup> that it was not practical to send drawings over to Spain and he could not continue to pay him while he was there. He had issued the claimant's P45 a few days after when he requested it and sent it to the wrong address, he corrected this and had sent it to the correct one. When he received a request for it from the claimant's solicitor he sent it straight away.

He felt he had given the claimant a lot of latitude over the course of his employment and felt if the claimant had been more up front with him about his trip to Spain he may have been able to accommodate him. While the claimant was away he had to take on a temporary person to fill the gap.

Under cross examination he reiterated that he was positive the arrangement was that the claimant was going to Spain for three weeks, one in which he would work for and two for holidays and that he would return on the 31<sup>st</sup> July 2008. In relation to the history of work absences he had raised with the claimant during the hearing, he explained the texts he received were normally in response to text he had sent the claimant. He had spoken with the claimant about these absences but had never issued him with a written warning. He did not respond to the claimant's email of the 12<sup>th</sup> August 2008, as he had been very busy. When he had asked the claimant on the 19<sup>th</sup> August if he was returning tomorrow the claimant had replied he was organising flights. He had told the claimant during the course of this phone call he could not continue paying him while he was absent from work.

He admitted he gave up on the claimant he thought the claimant would eventually just turn up again for work as he had done before. He explained that the claimant was a nice guy who did quality work. His wife's cousin had come to work temporarily for him when the claimant was in Spain and is still doing a small amount of work for him now. He did not understand the claimant's request for a letter of dismissal, as he had not dismissed the claimant, so he sent the P45 with no cover letter.

## **Determination**

The claimant commenced employment in January 2006 as an architectural draughtsman. In July 2008 his father was ill and so he wanted to return to Spain for a time. The Tribunal is satisfied that it was agreed that he would return to Spain for three weeks from 10<sup>th</sup> to 31<sup>st</sup> July. The intention was that he would take a week's work and have two weeks of leave. When he left on 10<sup>th</sup> July, he told his employer that he would see him on 31<sup>st</sup> July. This was despite the fact that his return flight was booked for 11<sup>th</sup> August. By 11<sup>th</sup> August the claimant's father was still ill so he did not return to Dublin. He told the respondent that he would return on 20<sup>th</sup> August but never, in fact, booked a flight for this date. The respondent spoke to the claimant on 19<sup>th</sup> August and told him that he could not continue to keep paying him while he remained in Spain. The claimant told the Tribunal that he was told that the respondent had no more work for him or money to pay him. The Tribunal is satisfied that he misunderstood what he was being told. When he returned to Dublin on 26<sup>th</sup> August, the claimant asked for his P45.

The Tribunal is satisfied that the claimant was not dismissed by the respondent. Accordingly, his claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed. His claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 is also dismissed.

No evidence was adduced during the course of the hearing in relation to the Organisation of Working Time Act, 1997 therefore the claim is dismissed.

No evidence of redundancy was adduced and, as noted above, the Tribunal is satisfied that there was no dismissal, hence his claim under the Redundancy Payments Acts 1967 – 2007 is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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