

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

Employee
- **Appellant (The Employee)**

UD1172/2008
MN1027/2008
WT462/2008

against the recommendation of a Rights Commissioner R-061356-UD-08/GC
In the case of

Employer
- **Respondent (The Employer)**
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 ORGANISATION OF WORKING TIME ACT, 1997 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. J. Hennessey
Mr. G. Whyte

heard this appeal at Portlaoise on 8 April 2009

Representation:

Appellant:
In Person

Respondent:
In Person

The determination of the Tribunal was as follows:

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner R-061356-UD-08/GC in the case of an employer (the respondent)

At the outset the appeal under the Organisation of Working Time Act, 1997 was withdrawn as it had been dealt with by another forum.

The employee worked as a plasterer for the employer, who is a plastering contractor, from 10 April 2006. The employment was uneventful until September 2007 when the employee suffered a work related injury to one of his eyes that caused him to miss two days of work. The employee's position, denied by the employer, is that at the time of this injury the employer had belittled him in regard to his reaction to the injury. After his return from the eye injury the employee was required

to install insulation to the roof of a house on which he was working. The employer was employing two other plasterers and one labourer at this time. The work was mainly confined to a development, which was proposed to be of fifty houses. On 17 December 2007 the builder of this development told the employer that they would only be proceeding to plaster houses in the development on a confirmed sale basis. This was confirmed in a letter of 21 December 2007 where it was pointed out that there were some, in the event four, houses to complete as part of the affordable housing scheme in the New Year and that the employer would be contacted when this work was scheduled.

The employer's position is that he decided to declare two positions redundant based on the receipt of this news from the builder and chose two plasterers as the candidates for redundancy based on LIFO. The employee was the second most junior of the three plasterers in terms of service. The employer's position is that he was the only person informed of redundancy on 21 December 2007. The employer hoped that more work would come in over the Christmas/New Year break to allow him to carry on with the labourer and the remaining plasterer.

In the event there was no work in January 2008. On 4 February 2008 the builder wrote to the employer to inform him that they were now in a position to commence work on the houses in the affordable housing scheme. When the employer sought to get the labourer and the senior plasterer to come back to work he discovered that the labourer had decided to leave the industry and the plasterer was certified unfit for work. The employer then hired a new labourer and the junior plasterer declared redundant on 21 December 2007. He preferred this plasterer to the employee because of his better quality of work.

Determination

Whilst the Tribunal had difficulty with the level of candour in the evidence of the employer the fact remains that on 21 December 2007, when the employer received the letter from the builder, there can be no doubt that a genuine redundancy situation existed in the employer's business. Moreover it cannot be said that the selection of the two candidates for redundancy, the employee and the junior plasterer, based on LIFO was unfair. Whilst the employer knew that work was to recommence on the affordable housing in the New Year he did not know, although he might have had an belief, at what stage this was to happen until the builder's letter of 4 February 2008. As there was a genuine redundancy situation on 21 December 2007, the selection of the employee as a candidate for redundancy was fair and there was no onus on the employer to re-employ the employee in preference to the junior plasterer when he found that there was the need for a plasterer in February 2008. For all these reasons the Tribunal finds that the dismissal was not unfair and the appeal under the Unfair Dismissals Acts, 1977 to 2007 fails. The employer having conceded the appeal under the Minimum Notice and Terms of Employment Acts 1973 to 2001 the Tribunal awards €644-49, being one week's pay, under those Acts

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)