

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee -**Claimant**

UD897/2008

against

Employer -**Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó'Catháin

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this appeal at Clonmel on 21 January
and 18 May 2009

Representation:

Claimant:

Ms. E. J. Walsh B.L. instructed by, on the first day,
Ms. Laura Bourke, on the second day, Ms. Jacqueline Lacey
both of J. J. Fitzgerald & Co. Solicitors,
Friar Street, Thurles, Co. Tipperary

Respondent:

Mr. Colin Carroll, Anthony Carroll & Co. Solicitors,
Carlton House, Fermoy, Co. Cork

The determination of the Tribunal was as follows:

Dismissal being in dispute in this case so it fell to the claimant to prove the fact of dismissal

The claimant was employed from September 2002 as a farm labourer. In 2005, as a result of a new development by the respondent, the claimant became one of two under gamekeepers reporting to a head gamekeeper catering for the duck shooting parties, members of which were clients of the respondent. Whilst the claimant never had a written contract of employment the employment was uneventful, save for a dispute about the distribution of tips, until a new head gamekeeper (NH) was appointed in July 2007. The claimant never received tips during his employment. The respondent's position was that distribution of tips was at the sole discretion of the head gamekeeper. The claimant sought to have the value of tips added to his agreed wages for the purpose of assessing loss as defined in the Unfair Dismissals Acts. As a farm labourer the claimant had worked a five day, 40 hour week with most weekends off. He had received overtime payments at premium rates

for extra hours worked and by the time NH became the claimant's report the claimant was routinely taking Monday and Wednesday as his regular days off.

NH became dissatisfied with the claimant's working arrangements. Whilst there is a dispute between the parties about the precise nature of this dissatisfaction the claimant's position is that NH wanted him to work a seven day week and the respondent's position is that NH was not happy with the claimant taking Monday and Wednesday as his regular days off. It is common case that, some time in March 2008, NH, who had the power to hire and fire, sought to get the claimant to agree to a new work roster. The claimant's position is that this proposed work roster would remove his overtime payments and require him to work with only one day off over a three-week period. His position is further that around this time NH told the claimant that he would be sorry to see the claimant go if he did not agree to the new arrangements. The claimant asked NH to put the proposals in writing and some time in April 2008 NH put a proposed contract of employment to the claimant. Included in this contract was a clause whereby the claimant was to opt out of the maximum average working hours of 48 per week as provided by the Organisation of Working Time Act, 1997. NH described this clause a guideline only.

The claimant did not sign this contract and his position is that NH told him that if he did not sign the proffered contract he would be dismissed. NH told the claimant that it would look better were he to resign rather than be dismissed. On 16 May 2008 the claimant met the respondent to discuss his dissatisfaction with the proffered contract and it is common case that the respondent told the claimant that he did not expect the any of his employees to work a seven-day week. While it is common case that both the claimant and the respondent left this meeting feeling that their problems were solved and that the claimant was to receive a pay rise, the respondent does not accept that the claimant proposed a new work roster. The respondent's position is that the agreement between him and the claimant was not communicated to NH. The respondent then went away on holidays and before he returned the claimant also took a week's annual leave. The claimant returned to work on 9 June 2008 to an immediate dispute with NH regarding the work roster. The following day there was a dispute about the non-implementation of the increased rate of pay. NH told the claimant that his behaviour was unacceptable and told the claimant to go home. It is denied that NH told the claimant that he would be leaving at the end of the week. The claimant took 11 June 2008 as one of his days off. NH could not recall the claimant telling him on 12 June 2008 that he had come for his written notice. Both the claimant and NH felt that they met the respondent on this day but the respondent could not recall such a meeting of the three of them. The respondent's position was that the claimant told him that there had been differences between the claimant and NH which were insurmountable and that the claimant could not work for NH any more. The claimant finished work on 13 June 2008 and received four weeks' pay in lieu of notice.

Determination:

It is clear that there were difficulties in the employment relationship between NH and the claimant for some months before termination of the employment. Whilst there is considerable dispute about the events prior to June 2008, not helped by the lack of clarity in NH's evidence, the Tribunal is satisfied that on 10 June 2008 when NH told the claimant to go home this amounted to a dismissal. The Tribunal is fortified in this view by the fact that, at a busy time for the respondent, the claimant received four weeks' pay in lieu of notice. If the claimant had resigned, as contended by the respondent, it is hard to see such payment being made. The dismissal was without any, or fair, procedure and must therefore be unfair. When considering the remedy the Tribunal is mindful that there was an element of contribution from the claimant in regard to the situation that existed between him and NH. Accordingly the Tribunal measures the award under the Unfair Dismissals

Acts, 1977 to 2007 at €10,000-00. It should be noted that the Tribunal did not consider the question of tips. The evidence was that the claimant never received tips any dispute about their distribution is a matter for another forum

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)