

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee
- *claimant*

against

Employer
- *respondent*

under

CASE NO.

UD1159/2008
RP993/2008
MN1067/2008

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Mahon BL

Members: Mr D. Moore
Ms. A. Moore

heard this claim at Dublin on 12th February 2009
and 22nd May 2009

Representation:

Claimant(s): Mr Denis Ryan, Keith Walsh, Solicitors, 8 Saint Agnes Road, Crumlin Village,
Dublin 12

Respondent(s): Michael Mc Namee BL instructed by Neville Murphy & Co., Solicitors, 9 Prince
of Wales Terrace, Bray, Co. Wicklow

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant commenced as an apprentice with the respondent in 1997, which he completed in 2002 and continued to work as a plumber with the respondent. During the course of his employment he did every task from plumbing houses, factories, and also worked on drainage in both domestic and commercial premises.

In March 2008 he and his work colleagues were called to a meeting and the director (PD) informed them that they would all be going on a three-day week. The next day was a Wednesday, he finished a job in Cheeverstown and PD told him to come back in to work the following Monday. As a result of the announcement of a three-day week, some weeks he would work three days and other weeks occasionally more than three days. According to the claimant nobody else was put on a three-day week. He approached PD and PD told him there was no work for him and if he could get another

job to do so. He rang PD on a number of occasions who repeated that if he could get another position he should take it. PD also told him he would sort out redundancy for him. The claimant was successful in obtaining a new position with another company and commenced employment with them on the 2nd June 2008. He rang PD to inform him. PD congratulated him. He rang PD's daughter who worked in the office on the Friday to tell her that he was leaving. It took him a few weeks to obtain his P45 from the respondent.

The letter of 24th October 2008 to the claimant's solicitors from the respondent was referred to. In this the respondent raised the issue that when they were placing the plumbers on a three-day week they were offered alternative work on the drains so that they could achieve a full working week. The claimant refused to do drainage work and had never wanted to work on the drains through his employment and on occasions had stated that "he wasn't a 'xxxx monkey' - he was a qualified plumber". The claimant refuted this; he had never used the phrase 'xxxx monkey' and had never refused to work on drains during the course of his employment with the respondent, as it was handywork for a plumber. In fact he had done all the drains with PD for about two years. He reiterated that he did not leave the respondent on his own choice. PD had been telling him to get another job and that he would sort out his redundancy.

Under cross-examination he confirmed that he had not been notified that his employment was coming to an end, as he was not given notice. He felt like he was being forced out, as he was the only plumber put on a three-day week. It was put to him that the meeting when the three-day week was announced occurred on the 17th April and ND had chaired it. The claimant disagreed and said that PD had in fact chaired this meeting. He had telephoned ND on the 30th May 2008 to tell her he was finishing up that day, as PD had told him to. As far as he was concerned PD was the boss he had always told him I sign your cheque and you do what I say. The respondent's representative suggested to the claimant that the other plumbers were doing drainage work during this period. The claimant replied that two plumbers were working for five days a week and at this time he was begging PD for more hours.

Asked if he had telephoned ND and asked her to process a redundancy claim stating that he just wanted the government rebate of 60%. The claimant denied this conversation had taken place and responded by saying all his dealings were with PD.

In replying to questions from the Tribunal in respect of the meeting of the 17th April the claimant said that they were all in shock and talked between themselves afterwards. PD told them that things were getting slow and that even his own son would be placed on a three-day week. There had been no mention of drainage work at this meeting.

An apprentice plumber who worked with the respondent since August 2006 and who gave evidence on behalf of the claimant told the Tribunal that he was let go on 12th January 2009. Up to August 2008 he was working a five-day week and so was every plumber apart from the claimant.

Respondent's Case.

A drainage engineer who commenced employment with the respondent in May 2007 gave evidence on their behalf. At the meeting in April ND had stated that all plumbers would have to go on a three-day week. PD had also spoken. The claimant had said he would not do the drainage work and that he would carry on doing a three-day week as a plumber. From his commencement with the respondent in May 2007 to May 2008 he was not aware of the claimant doing any drainage work.

Under cross-examination he confirmed that ND was the main chair at the meeting in April. He heard that the claimant was on a three-day week. At the time he was working with the other plumbers on the drains. He had never really worked with the claimant as he normally worked on his own.

Next to give evidence was ND she has been managing the company for about eight years. She conducted the meeting of the 17th April 2008 and her father PD (director) was present. She explained the situation that they were having financial problems and plumbing work had dried up. She informed them that they would have to cut back on the plumbers' hours. However they could do drainage work if they wanted. The company offers a 24hour drainage service. The plumbers were paid the same rate for the drainage work. All of the employees were happy to work on the drains with the exception of the claimant. The claimant said he would prefer to do the plumbing work for three days and wait for things to pick up again. The other plumbers made up their hours by doing the drainage work. She maintained that she gave the claimant preferential treatment as she tried to increase his hours by giving the claimant more plumbing work if they had it. The other plumbers were achieving full time work as they were working on the drains. After averaging out the claimant's pay it appeared that he had received 70% of his normal weekly wage from April to when he terminated his employment.

On Friday the 30th May the claimant telephoned her and told her he was sorry but he had got a job elsewhere and he was starting the following Tuesday. She had wished him well. He started his new job on the 2nd June 2008 and she paid him till the 5th June. The claimant contacted her during June 2008 on her work and home phone asking her to apply for redundancy for him from the state. He wanted her to claim for the redundancy and instead of giving him 100% she could just give him the 60% rebate. Redundancy had never been brought up during the course of his employment and she thought that he might have misunderstood the law in relation to it.

During the course of cross examination it was put to her that the claimant had worked on drains on the 12th May in Cheeverstown and the 20th May in Maple Road. In respect of Cheeverstown he was required to unblock traps she explained that this was a basic plumbing requirement and not classed as drainage work. In relation to the Maple Road work that was also standard plumbing. The claimant drove a car for work purposes. He did not have insurance on the company vans, as he did not want it. She had not been privy to any conversation that her father (PD) may have had with the claimant. The claimant had telephoned her in relation to the redundancy rebate while she was in the presence of her father and the claimant's uncle. All the plumbers were on reduced hours in respect of plumbing work but they also did the drainage. The claimant did not want to work on the drains and because he had a car he could not carry the drain clearing equipment.

In replying to questions from the Tribunal she confirmed that they have five employees three of which are plumbers. One plumber was being made redundant today the day of the hearing at his request. If the claimant had stayed he would be still in employment. They have had to introduce pay cuts to keep their staff in employment. When the claimant rang in to say he was commencing work on the 2nd June she did not insist on him working out his notice.

Next to give evidence was the director of the company PD. He confirmed that his daughter (ND) managed the company and she had held the meeting of the 17th April 2008. He recalled the claimant's comments in which he stated he did not want to do drainage work. The claimant said to him that there were jobs out there so he told the claimant he had to do what was best for him. He denied that he had ever discussed redundancy with the claimant. He did not tell the claimant that

he would sort his redundancy for him.

He explained that for the major drainage work you need a van to carry the equipment. He was going to put the claimant on the insurance for the van a couple of years ago but the claimant indicated a lack of willingness to work on the drains. As the claimant drove a saloon car for work he could not carry the equipment required. The claimant's Cheeverstown job on the 12th May was to unblock a sink trap - this is a plumbing job. On the 20th May the Maple Road job was drain clearance. This was outdoor work and if it had involved underground work the claimant would have contacted the office to request a van with equipment to clear it. Any plumbing work in excess of the three allocated days was given to the claimant. He denied that other plumbers were given more plumbing work than the claimant.

Under cross-examination he explained that he would meet with the plumbers if they had a problem in relation to tasks assigned to them. If they had problems carrying out a job they would ring him for advice. He would either talk them through the problem or go to the job to sort it out. He signed the letter of the 17th April stating that the claimant had been put on a three-day week for unforeseeable future. He denied that he had told the claimant he would sort him out with redundancy if he found another job. He had no intention of letting the claimant go and he would be still in employment with them today but maybe on a reduced wage. The paper work for the job in Cheeverstown was produced, he explained it was a small gully outside and a plunger with a rubber hose on the end would have cleared it. He had never supplied the claimant with rods as he refused to carry them because of the smell. The claimant had gone out with him on the vans before if there was nothing doing, but the claimant would not get in to the manholes. This witness would have to do it. The claimant was a good plumber and employee.

Determination

The members of the Tribunal very carefully considered all of the evidence adduced, statements made and documents presented during the two-day hearing. The Tribunal heard that due to a downturn in business and consequent financial difficulties the respondent found it necessary to temporarily reduce working hours. Jobs were not under threat at the time. The respondent tried with some success to achieve full time work for the plumbers by giving them drainage work, which the claimant refused. The claimant worked on average well in excess of a three-day week. A statutory redundancy process was not invoked by either party. It is the finding of the Tribunal that a redundancy situation did not exist in relation to the claimant's employment. Moreover the claimant did not present sufficient and adequate evidence that the respondent dismissed him even in a constructive fashion. Therefore it is the unanimous determination of the Tribunal that the claims under the Redundancy Payments Acts 1967 – 2007, Unfair Dismissals Acts 1977 - 2007 and the Minimum Notice and Terms of Employment Acts 1973 – 2005 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)