

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee
– Claimant

CASE NO.

UD822/2008
RP697/2008

against

Employer - Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr. M. Noone
Mr. A. Butler

heard this claim at Wicklow on 28th November 2008 and 16th March 2009

Representation:

Claimant: Mr. Andrew J. Cody, Reidy Stafford, Solicitors, 1-3
Moorefield Terrace, Newbridge, Co. Kildare

Respondent: Mr. Tom O'Grady, IBEC, IR/HR Executive, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case:

The Despatch Manager gave evidence to the Tribunal. The claimant commenced employment with the respondent in March 2006 as a general production operative. The claimant was one of four employees who worked as part of a team on the despatch nightshift. However, due to the introduction of new technology this work came to an end. The claimant's contract stated, *"It is a condition of employment that all employees are fully flexible and interchangeable relative to any work or work areas as required by management."*

The despatch manager initially met with the despatch nightshift employees on the 18th January 2008. He indicated that he would be conducting a review of the nightshift and he would revert with the outcome in March 2008. On the 21st March 2008 he formally told them of the disbandment of

the nightshift due to introduction of three automatic processes.

There were a number of alternatives available to the nightshift team within other sections. Two vacancies existed on nightshift cleaning with the working hours of 10pm to 6am. One vacancy existed within despatch chill F with working hours of 6pm to 2am and 2pm to 9pm on bank holidays. A further vacancy existed in despatch chill B with working hours of 2pm to 10pm. This meeting commenced a consultation process with the employees towards facilitating their move to the new positions. Later that week the despatch manager met with the employees on an individual basis and as a team. The employees were provided with an outline of the conditions in terms of hours of work and hourly rates.

On the 22nd April 2008 the despatch manager met with the team and two issues were addressed on this occasion: (1) rates of pay (2) hours of work. The witness stated that the role of nightshift cleaning would mirror the employees' rates of pay and hours of work. The employees raised five issues, some of which related to bonus. Human resources adjourned the meeting and when the meeting resumed each of the five issues were addressed. One of the employees left the meeting but the claimant remained in the meeting. The employees were informed that training would be provided for two weeks on a Monday to Friday basis. An agreement was reached at this meeting and a written document was drawn up for signature by the employees and management, the claimant's copy was dated the 24th April 2008 and stated, *"I am very pleased to confirm your transfer to the Cleaning Nightshift..."*

The despatch nightshift was due to cease on 2nd May 2008 and the claimant's transfer to cleaning was to commence on Monday, 5th May 2008. However, the despatch manager was informed by his supervisor that the claimant might have an issue about the new role. Subsequently, the claimant presented for despatch nightshift. The despatch manager informed the claimant that he should report for duty to the nightshift cleaning area but the claimant refused.

On the 6th May 2008 the despatch manager met with the claimant who reiterated his position. The despatch manager suspended the claimant with full pay pending the outcome of an investigation into his refusal to carry out the duties of cleaning nightshift. A disciplinary process was instigated and the claimant was dismissed as a result. The claimant subsequently appealed the decision to dismiss him from his employment, but the decision of the company was upheld at the appeal.

During cross-examination the witness stated that on the 22nd April 2008 he believed that an agreement was reached concerning the new roles, with the exception of one employee. However, the claimant did not sign the agreement when it was provided to him. The witness accepted that the duties on nightshift cleaning were completely different to the duties involved with despatch.

Claimant's Case:

The claimant gave evidence to the Tribunal that due to personal circumstances he needed to work nightshifts. For that reason the alternatives available in the chill sections were unsuitable to him. The other alternative available to him was that of nightshift cleaning. The claimant did not accept this offer and he made his refusal known to management. The claimant applied for the position of night despatch operative, as he had experience of this role. The claimant had completed some accountancy exams and he possessed computer skills. The claimant's second concern with nightshift cleaning was the use of chemicals; as the claimant was worried about risks to his health.

During cross-examination the claimant accepted that he had signed the terms and conditions for the role of production operative.

The claimant did not accept that the pay for the new role was the same and that the hours would not have suited him. It was put to the claimant that he would have to attend during day shifts for two weeks only and for the purpose of training. The claimant replied that if the alternative offered to him was similar to the work he had performed on the despatch nightshift there would have been continuity.

In reply to questions from the Tribunal, the claimant stated his job on despatch nightshift still existed.

Determination:

The claimant was employed as a production operative on the despatch nightshift. The respondent stated that there was no need for stock-counting to continue and this work ceased. The Tribunal does not agree with the claimant that his job on despatch nightshift still existed. By virtue of Section 7 of the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that a prima facie redundancy existed in relation to the claimant's employment.

The second issue considered by the Tribunal was whether the claimant, by virtue of Section 15(1) (2), was disentitled to redundancy by virtue of his refusal to accept the alternatives offered by the respondent. While there was a dispute between the parties concerning rates of pay and hours of work, the Tribunal is more inclined to accept the evidence of the respondent on these matters. The claimant explained personal reasons as to why he needed to work nightshifts and the Tribunal attaches weight to these reasons which the claimant says was the reason he could not accept some of the alternatives.

With the alternative of nightshift cleaning the claimant's duties would change. The Tribunal notes that the claimant's terms and conditions contained a flexibility clause for general production operatives. The Tribunal finds that this clause can only go so far and that the alternative offered to the claimant consisted of entirely different duties. The claimant stated that he did not find the work congenial and the Tribunal finds that the claimant is not disentitled to redundancy as per Section 15(2).

The Tribunal finds that a redundancy situation existed in relation to the termination of the claimant's employment. Accordingly, the Tribunal awards the claimant a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria:

Date of Birth:	19 th November 1967
Date of Commencement:	08 th March 2006
Date of Termination:	26 th May 2008
Gross Weekly Pay:	€625.47

It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

The Tribunal having found that a redundancy situation existed dismisses the claim under the Unfair Dismissals Acts, 1977 to 2007, the two being mutually exclusive.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)