

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMSOF:  
Employee - claimant

CASE NO.  
UD1492/2008  
MN1445/2008  
WT611/2008

against

Employer - respondent

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P McGrath BL

Members: Mr C Ormond  
Mr S O'Donnell

heard this claim at Dublin on 7th May 2009 and 30th June 2009

Representation:

Claimant: Mr Brendan McDonald  
Coughlan White O'Toole  
Solicitors  
Moorefield Road  
Newbridge  
Co Kildare

Respondent: Mr Tim O'Connell  
IBEC  
Confederation House  
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

#### **Respondent's case:**

The Production Manager (PM) gave evidence that the claimant was a very good worker and did overtime when it was required. The company tried to get more work in the UK, but this did not materialise. He spoke to the claimant in February 2008 to explain the company's predicament, and

then in September 2008 he told the claimant that his employment had to be terminated.

There was an agreement with the union that 'last in first out' would be the method for choosing which employee should be made redundant, and the claimant was the person with the shortest service. He was given 4½ weeks pay to compensate him for his good work.

The second witness for the respondent, the Concrete Division Manager (CDM), gave evidence that the company is highly unionised and that all human resources policies, including the redundancy selection process, are set down in the 'yellow book'. The yellow book is the result of negotiations between the company and a number of trade unions, and is issued to all employees. The redundancy selection process defined in the yellow book is by location, by process and then by last in first out.

According to CDM, by the end of 2008 business was decreasing by 50% year on year in the concrete and flow area. In the course of 18 months the number of employees in the area was reduced from 119 to 50. The company attempted, on a trial basis, to generate business by bagging product for the UK market. The company could not sustain the number of employees in the area, and, as the claimant was the last employee into this area, he was selected for redundancy. The reason for the claimant's selection was due to the downturn in business and for no other reason.

Six weeks previously CDM told the claimant that there was a position in pits and quarries in Huntstown, nine miles from the claimant's current position. CDM contacted the pit manager in Huntstown to seek a position for the claimant as the result of PM's positive recommendation. The position was as a fitter, a role the claimant had previously carried out when contracted from an agency. The role was initially on night shift, but could possibly change to day shift at a later time. The claimant initially said he had qualifications as a fitter but later said that he did not; and so, CDM could not pursue the position for him.

The Human Resources Manager (HRM) gave evidence that the vast majority of non-management staff members are in a trade union, but regardless of union membership, the yellow book procedures apply to all staff. There was a severe downsizing of staff numbers in 2007 and 2008. HRM met the claimant two weeks prior to his contract not being renewed to give him notice of termination of his employment. The claimant was upset, but should have been aware that it was a possibility as CDM had previously spoken to him. The claimant wanted to know why he was selected and HRM explained the last in first out process and that the other employees in his area had longer service than him.

The company operates two types of redundancy payment, one for voluntary redundancy and one for compulsory redundancy. For voluntary redundancy the company pays 3½ weeks per year plus statutory redundancy. For compulsory redundancy the company pays 4½ weeks per year plus statutory redundancy. The claimant did not have two year's service and therefore was not entitled to a statutory redundancy payment, and was on a fixed term contract. The company gave the claimant a bonus of 4½ week's pay, as he had been an excellent employee.

HRM could not say if the claimant had received a copy of the yellow book when he commenced his employment, but it is normal practice for every employee to receive a copy on commencement.

### **Claimant's Case:**

The claimant gave evidence that he originally worked for the respondent company as an agency employee from 2003. When a position arose at the company the claimant applied and was successful. He was employed in March 2007 as a general operative with an initial six-month contract. The claimant received a safety statement on commencement, but did not receive a copy of the yellow book. He later asked his supervisor for a copy, but never received one.

When the claimant's six-month contract was up he asked his supervisor, PM, for another contract. PM said he would get the contract but the claimant didn't receive it. When the claimant continued to ask for a contract PM told him not to worry, that he was permanent and that he would give him a contract some day. In March 2008, CDM told the claimant he was being let go for two to three weeks due to the economic downturn. The claimant was given a new six-month contract when he returned.

In May 2008 CDM told the claimant that he couldn't keep four people in the 'flow' section and said that he had a job for the claimant in Huntstown as a fitter. The claimant told him that he had no qualifications as a fitter. CDM told him that he had previous experience working as a fitter with the company and to bring whatever papers he had and he would arrange the job. He had previously worked for the company as a fitter, but had not been asked for qualifications. He did not speak to CDM about his contract again.

In September 2008 he went to HRM's office with PM where he was told he was being let go. HRM explained the situation to the claimant. The claimant was shocked; as PM had told him many times that he was permanent.

### **Determination:**

With respect to the claim under the Organisation of Working Time Act 1997, the Tribunal can only deal with complaints relating to holiday pay when dealing with claims made under the Unfair Dismissals Legislation (as per section 40 of the Organisation of Working Time Act 1997). The claimant has indicated he has no issue with respect to his holiday pay, therefore the claim under the Organisation of Working Time Act 1997 fails.

The Tribunal has reviewed the evidence adduced over the course of this two-day hearing. The Tribunal found the claimant to be a personable and honest witness with whom the employer had had no problem. It is understandable, in circumstances where the claimant had worked onsite for upwards of six years (albeit as an outside contractor for a significant part), that the claimant was shocked and upset that his position was being made redundant in September 2008.

However, having considered the consistent and uncontested evidence of the employer, the Tribunal does not doubt that there has been a significant downturn in business in the last few years. With such a downturn redundancies are inevitable. The last in first out policy brought the claimant into the firing line.

The Tribunal does not accept that the claimant was unfairly disadvantaged by reason of his foreign status, and whilst the Tribunal cannot state whether or not the 'yellow handbook' was ever received by the claimant, the Tribunal cannot find that the absence thereof placed the claimant at a disadvantage.

In all the circumstances the claims under the Unfair Dismissals Acts, 1977 To 2007, and the Minimum Notice And Terms Of Employment Acts, 1973 To 2005, must fail.

Sealed with the Seal of the  
Employment Appeals Tribunal

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