

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee – *claimant*

UD860/2008

RP735/2008

MN792/2008

WT354/2008

against

Employer – *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
REDUNDANCY PAYMENTS ACTS, 1967 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: Mr. L. Ó Catháin

Members: Mr. M. Forde  
Ms. H. Kelleher

heard this claim at Cork on 5 March and 19 May 2009

Representation:

Claimant: Ms. Elizabeth Scally BL instructed by Laura Wycherley of Fleming & Barrett,  
Solicitors, 66A South Main Street, Bandon, Co. Cork

Respondent: Ms. Eileen Hayes of PJ O'Driscolls Solicitors,  
41 South Main Street, Bandon, Co. Cork

The determination of the Tribunal was as follows:-

The claims under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn.

The fact of dismissal is not in dispute.

## **Respondent's Case:**

The general manager gave evidence. The claimant was a difficult individual to deal with. They started doing staff appraisals in 2004 and the claimant's attitude was an issue then. When contracts of employment were introduced, the claimant was missing on the day the contracts were to be signed. He insisted that the competition clause be struck out so he could work in his father's garage. The claimant also took a significant number of sick days off, nearly all on Mondays and Fridays. He also felt that the working week should be 39 hours and not the 40 it was.

For a time the claimant's rate of pay was frozen. One year he was the only employee not to get a pay increase. Six weeks before the incident that resulted in the claimant's dismissal he did get a pay increase. The general manager was reasonably happy with him and hoped he had mended his ways.

On the Monday before the incident the junior member of staff together with 2 members of his extended family gathered outside the gate. The general manager did not know whether they spoke to the claimant. He thought they spoke to one of the senior workshop staff in connection with words that had been spoken at a social gathering.

On Thursday the junior member of staff came into the office and reported in a trembling voice that the other workshop staff were isolating and excluding him. At break time they all sat at one table leaving a lone chair for the junior staff member. His colleagues would not speak to him or help him with his work. The claimant seemed to be the instigator.

The general manager spoke to the acting managing director, who told the claimant to pack up his belongings and go home. The claimant was asked to come to a meeting the following morning at 9.00am.

To investigate the complaint the general manager spoke to several of the workshop staff. He discovered that the claimant had been annoyed that no Christmas bonus was paid and he organized a go-slow in the workshop to cost the company more than the Christmas bonus would have. Also early in the year, staff were asked to apply for their main two week holiday so that it could be arranged that the workshop was staffed through the summer. None of the workshop staff applied for leave, so it was decided to close the workshop for 2 weeks starting at the end of July. The claimant regarded this as a victory for him.

On Friday morning the claimant did not turn up for the meeting. He arrived at 2.00pm with his infant son. The general manager asked him for an explanation for his role in each of the three issues; making the place unproductive, blocking the holiday roster, and bullying the junior staff member. To each issue the claimant replied, No Comment. The general manager then dismissed the claimant for gross misconduct. The claimant smiled and walked out. The claimant did not appeal his dismissal.

After the claimant left the workplace changed. Staff members are happier. The holiday roster is working well, so the workshop did not have to close for 2 weeks.

The Tribunal also heard evidence from the service manager who is responsible for the daily running of the service department. He knew about a go-slow around January 2008. January is a busy time for the respondent and he had difficulties at certain times. There are three types of customers, off the street, car sales and warrant customers. Where a customer came in off the street he would

endeavour to have the car ready at 10.30am before the tea break but at times the lads went on their break and would not have the job ready or would spend extra time on the car. A lot of customers wait for the car and the respondent would try to keep the waiting time as short as possible but at times there were complaints when a vehicle was not ready as promised. At the end of each month he runs a report showing the hours worked versus the hours charged. A certain time is allocated for example for a service, two hours, and if more than the allocated time is spent on the job the respondent can only charge for the two hours. These figures can be looked at to show productivity. The claimant was on five days holidays in January 2008.

Witness had a reasonable working relationship with the claimant. At times he would be extremely helpful and at other times he would be painful to work with. He was a very good mechanic and he spent an 11 week period with Renault in Dublin training to become a Renault certified technician. Its a requirement that every dealership has to have a certified technician and sometimes the respondent had one and at other times they had two. During the period January 2007 to 2008 theyofficially had one certified technician. The work was split between witness and DO'C, who was inAustralia for some of the time and they hand out the work to the technicians. Most of the time theone mechanic starts and finishes the job. One customer had a water leak in her car and he assignedthe job to the claimant, who was good at fixing water leaks and it's a job that can take time. Theclaimant went on holidays leaving the job unfinished and witness could tell he was dragging out thejob. The claimant went on holidays on 20<sup>th</sup>/21<sup>st</sup> January and it looked like he delayed the job onpurpose. He did not raise this with the claimant as he felt there would be conflict. Witness had tolook after the mechanics and the customers. The claimant was going on holidays anyway andwitness was afraid that if he did raise it this would have a long-term effect and would make lifeawkward for witness in the long run.

On another occasion when the claimant's torch went missing he would not open his toolbox until the torch re-appeared. He then had no tools to work on the cars and he had to borrow them from another mechanic. All the mechanics have their own toolboxes and some take them home at weekends. It was like a protest and witness knew it was happening but the majority of the claimant's work was more technical and he would not need as many tools. He did not want to make a big issue and it fizzled out in the end. There is overtime at busy periods especially in January/February when new cars are sold. Witness would ask staff to do overtime and it seemed like everybody he asked said "no". While he did not know where this was coming from, he had his suspicions. On a couple of occasions some of the employees would afterwards say they would do the overtime and with two of them in particular where they originally said they would not do the overtime they would then agree to do it but the other employees would not know they had changed their minds. It seemed like it was a group thing where employees said don't to overtime. Witness could not however connect this with the claimant but he was number one point of contact and he did not have difficulties with other employees. If there was a difficulty it normally stemmed from the claimant.

In cross-examination witness stated that no other employees, other than the claimant were dismissed because of the go-slow. In relation to Mr B's work rate being down witness stated that hespoke to DO'C, who was in Australia. He had a suspicion that the claimant was organizing it and heheard DO'C giving out to the claimant and asking him to hurry and get things done. There was adefinite go-slow in operation and he was having difficulty handing over the cars. It was his suspicion that the claimant was responsible for everything but he did not see him do it.

DB in his evidence told the Tribunal that he commenced his employment with the respondent in

November 1999 and he was a Chrysler technician. The arrangement in relation to holidays was that an employee went to the service manager a week or so in advance if one wanted a few days off, however if one needed a full week one would ask a month in advance. At the end of 2007 a letter issued asking employees to decide the two weeks they intended taking holidays. His wife was expecting their second baby therefore he could not give the exact dates of his holidays. At the start of January 2008 the claimant said that the holidays did not suit and that everybody should ask for the same two weeks to get the workshop closed down. A notice issued stating that the workshop would close for two weeks in July. Witness requested days off from the general manager and stated that if his wife had the baby he would get someone to fill in for him. He did not tell the claimant, as he did not want to be part of closing down the workshop. Witness did his work and had no issues with the claimant.

On one occasion the claimant re-arranged the furniture so that witness had to sit on his own when staff were playing cards at lunchtime. When witness greeted the claimant in the morning he was ignored by everyone except for one staff member, DC. Later in the week he complained to the general manager and when he went back to work he was again ignored. When he asked the claimant for help he also ignored him. Since the claimant left there has not been any such incident and witness is now happy in his work. The claimant told witness he was trying to get a slow down organized as no bonus had been paid the previous Christmas. The go-slow would mean less throughput of vehicles. While witness did not agree with the go-slow he left the impression that he did agree, as he did not want to be left on his own. He made it look like he was slowing down and did not speak to anyone regarding the go-slow. Since the claimant left there has not been any problems in the workshop.

In relation to the overtime he went away to give the impression he was going home and was not going to work the extra hours and then came back and worked the overtime. Again he did not tell anyone for fear of being isolated. He was aware there was pressure not to work the overtime and he could see the service manager asking employees and they refusing to work the extra hours. He has his own tools but leaves them at work, but some take them home to do work at night.

In cross-examination witness stated that he had no problem with the claimant up to 2008. While the claimant was away in January he went back to as near normal as possible but he could not talk for anyone else. The claimant had a hold over him.

The managing director in his evidence told the Tribunal that he employed the claimant as a technician. During the course of his employment he received specific training in Renault electronics over an 11/12 week period at a direct cost of €25K. They sought the advice of the S.I.M.I. when putting contracts in place. The claimant did not sign the contract at the specified date as there was a competition clause and he used to service cars himself at night. The general manager spoke to witness regarding a complaint of bullying from DB, the previous witness, in addition to the go-slow in the workshop and the holiday roster. At the end of January DO'C came to witness stating there was something wrong but could not see a particular reason as to why it was happening. The claimant was asked to remove his toolbox from the workshop and witness was to meet him the next morning. The claimant did not turn up at 9am and the general manager was instructed to continue the investigation as witness had an appointment in the afternoon. The general manager handled it from there. He had the authority to hire and fire.

The claimant was suspended in 2004/05 in relation to an overtime issue. At that time a lot of the technicians were not doing overtime and having spoken with the claimant he did not want to do the overtime as he had an issue with the way it was being paid. He was paid for the week, apologised

and returned to work. In place of paying a Christmas bonus the respondent took the staff to the greyhound track and they also got some money for betting. Some staff did not go and that was their choice. He was not aware that the claimant's wife was pregnant. The normal policy in respect of holidays was to go to the service manager and ask for the particular weeks. There had been difficulties as too many of the staff wanted the same time off. Nobody came forward to give an indication of their preferred holiday period and the respondent then picked a two week period and said they would close down, but they did not in the end. When the claimant left everyone else came forward and planned their holidays. There have not been any issues in the workshop since. The claimant was not told he could appeal.

In cross-examination witness said that he and the general manager are responsible for disciplinary matters. He mentioned prior to 2007 there was a problem with the claimant and they (respondent) froze his wage increase for six months. He then received a minimal increase at the end of 2007 and the claimant said he would leave and look elsewhere. The claimant received verbal warnings which are recorded in the annual reviews. He was not aware that the claimant had been encouraging young staff members to join the union but he had no issues with the union. It is not correct to say that he views collective action as undesirable. The reasons for the claimant's dismissal were (1) the respondent believed he was involved in the instigation of the go-slow (2) the holidays issue, and (3) bullying. When the claimant was told to put his tools in the box, nothing was meant by it, it was a throw-away phrase. Under the Terms and Conditions of Employment, Disciplinary Procedure, Stage 4 – Suspension Pending Investigation: witness was asked if he was happy this section was complied with and his response was that his dismissal came under the heading of gross misconduct. He did not tell the claimant he suspended him. He did not have the written outcome of the investigation. The general manager told witness that when the claimant received the allegations his response was "no comment". The claimant was dismissed on the spot and he did not ask for representation. He felt that four hours was sufficient time to have a full investigation and to allow the claimant an opportunity to respond. He accepted that the claimant was not told of his option to appeal the dismissal. There were no verbal or written warnings outside to the appraisal process

### **Claimant's case:**

The claimant in his evidence told the Tribunal that he commenced his employment with the respondent in 2000. Initially he worked as motor mechanic and was promoted to senior motor mechanic. He got on very well, was chosen to go for training and he did whatever was asked of him. He and all the other employees were given contracts in 2004 and he handed it to his solicitor who was away for a week. The claimant spoke with the general manager and told him he would not have the contract back by the specified time and he seemed okay with that. Two days after the claimant and two other employees were stopped at the gate and the claimant having discussed the matter with the managing director signed the contract without his solicitor's approval. He did not remember being suspended at that time. In relation to the 2005 appraisal he remembered that a pay freeze was applied to his wages for six months. He was not contractually obliged to do overtime. Certain issues were brought up at a pay review but outside of that he never received a warning. The young mechanics would ask his advice if they could not fix a car or they would ask him about overtime.

The practice was to get a Christmas bonus which was usually €250, and there would always be a Christmas party where the respondent would take them out. There was talk going around that they were not getting the Christmas bonus in 2007 but it was never said directly to the staff. All the

staff were relying on the bonus and they were disgusted when it was not paid. They usually finished on 23<sup>rd</sup> December and would return to work on 7<sup>th</sup> January. He did not orchestrate the go-slow in January 2008. All the staff worked away all year and would get an award at the end of it. The claimant was not motivated. In relation to DB he never walked up to him and said he was going on a go-slow. The claimant had booked a week's holidays in advance for his brother's wedding in Austria. There was a leak in the car and while he had ordered the parts the previous week, they arrived the day he was leaving for his holidays. To say he did not finish it deliberately was not the case. There was nothing he could do about it. The respondent did not speak to him about the go-slow or about his attitude not being right and he never refused to do anything. In January they would usually have second hand cars but in 2008 the numbers were down and the sales were well down. The claimant had spent a lot of time working on a Laguna which was not shown on his work record.

A lot of the younger employees would not take two weeks' holidays together. They were just back in January and they had to apply for the holidays. The claimant's wife was pregnant therefore he did not know when he wanted his holidays. He did not tell others to take their holidays at the same time. The respondent implied that he orchestrated it. DB had already booked his holidays in advance. The respondent had given the staff a hand-written letter to say there was going to be a shutdown for two weeks. On the Saturday night prior to the claimant's dismissal there was a verbal altercation involving DB. While the claimant was there at the start of the night he had left the pub before the altercation started. On the Monday DB approached the claimant in relation to the altercation and on Wednesday the claimant did not salute him and DB alleges he was bullying him as a result of the altercation on the Saturday. On the Wednesday nothing was said to the claimant by management. On the Thursday 20<sup>th</sup> Feb 2008 at 5.15pm he was told by the managing director to bring in his van, to pick up all his tools and to call in the next morning. The claimant felt his job was gone there and then. He had never heard of a policy of taking home the toolbox each night. The claimant assumed it was something that DB had said to management. He went in around 2pm and was called to the office by the general manager. He told the claimant "you're gone from here" and asked him to reply to three allegations: (1) organising a go-slow (2) organising to close the place for two weeks (3) isolating DB. The general manager did not give the claimant the piece of paper showing the allegations and when he requested a copy it was not given to him. The claimant was not told of his right of appeal.

When the Christmas bonus was not paid the staff were not happy. The respondent had said the door was always open but nothing happened. The claimant got 12/15 forms to join the union and he had every intention of joining. Some of the younger lads asked about the union and the claimant told them the forms were there if wished to complete one. He did not receive a reference. The claimant never received a written warning and no formal disciplinary procedures were taken against him. He then told the Tribunal of his efforts to secure alternative employment.

In cross-examination the claimant accepted that he was to come in to the office on the morning of his dismissal. The reason he did not come in that morning was that he called seeking legal advice but his solicitor was not available. He then came in that afternoon at around 2pm.

In answer to questions from Tribunal members witness stated that it was nice to be appreciated when the Christmas bonus was referred to. There was no official foreman so the claimant was probably seen as such by the younger staff members. The go-slow was suggested in the canteen and as the person is still working for the respondent he did not want to give a name.

The Tribunal also heard evidence from a colleague who worked with the claimant for seven years.

The claimant was helpful and if any problem he would help you. He disagreed that the claimant was the ring-leader. When the Christmas bonus did not materialise in December 2007 he and all his colleagues were shocked. Witness was also disappointed and felt he was not appreciated. The claimant never came to him in relation to the go-slow nor did he ask him not to submit his holiday plans.

The last witness to give evidence was the man who was involved in the altercation with DB on the Saturday night. He had had a few pints but there was nothing malicious. In relation to the claimant's dismissal he had been told that the claimant had been sent home. He then went to the respondent and was told that the claimant was no longer a part of the company but that it had nothing to do with the incident on the Saturday night.

In cross-examination witness stated that when he and his colleagues saw the claimant packing his tools they thought he had been sacked. He did not think that many people took part in the go-slow. Nobody came to him regarding the go-slow or stating everybody was taking the same two weeks holidays. He would usually only take a day or two holidays together and he was not happy when the respondent asked that all the staff specify two weeks. If you had nothing planned it would be a waste of two weeks. Nobody ever asked him not to do overtime. In relation to the Saturday night witness made a comment about DB's family, he apologized to his brother-in-law and he felt that it should not have come back in to the work place.

**Determination:**

The Tribunal find as a fact that the respondent failed to follow the procedures as laid down in their own contracts. There was also a conflict of evidence in this case and the Tribunal find that the claimant was unfairly dismissed.

The Tribunal make an award of €16,250 under the Unfair Dismissals 1977 to 2007 and €2,500 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claims under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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