

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.
UD476/2009

EMPLOYEE

MN486/2009
WT213/2009

against
EMPLOYER

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: Mr E. Murray
Members: Mr J. Hennessy
Mr J. McDonnell

heard this claim at Waterford on 22nd July 2009
and 18th November 2009

Representation:

Claimant: Ms Fiona Pekaar BL instructed by Mr. Mark Foley Solicitor,
Sean Costello & Co, Solicitors, Haliday House, 32 Arran Quay, Dublin 7

Respondent: Mr. Cyril Cawley Solicitor, Kinsella Heffernan
Foskin Solicitors, Otteran House, South Parade, Waterford

The determination of the Tribunal was as follows:

The Claimant in this case seeks redress under the Unfair Dismissal Acts and the Minimum Notice and Terms of Employment Act arising out of the termination of his employment with the Respondent on the 19th of September 2008. Also the Organisation of Working Time Act, 1997.

The Claimant had commenced employment with the Respondent on the 13th of April 2007 as a "technical manager". The Respondent carries on business as an industrial painting company.

Evidence was given on behalf of the company by the operations manager ("O.M "). He said that they had employed the Claimant as a technical manager and understood that he had the necessary expertise and experience to operate in this role. The witness tendered a list of duties that the company expected the Claimant to perform. He conceded that this list was composed in anticipation of the Tribunal hearing but it is indicative of the type of duties that the company expected the Claimant to undertake. An analysis by him of that list indicated that the Claimant had

failed to undertake many of the tasks expected of him.

Indeed, the O. M. went on to give evidence of a number of jobs that the Claimant was involved in where his basic expertise in selection and specification of paint had caused significant problems for the company.

In July 2008 a meeting was held in the company's offices in Waterford which was attended by the Claimant and the Op Man (O.M.) and his co-director at which it was outlined to the Claimant that the company felt that he was falling short and was not performing the role for which he had been employed and that there was an onus on him to improve his performance.

Some short time after that meeting it emerged that the incorrect paint had been put on panels at the shop in Dublin, of a substantial client and that again was attributed to the Claimant.

The company resolved to dismiss the Claimant and a letter was written to him on the 19th of September 2008 advising him of the termination of his employment. That letter however invited him to discussions in relation to the matter. Subsequently the company contacted him with a view to offering him a diminished role in the business but the matter was never followed up by the Claimant.

The Claimant's co-director who described himself as being the financial director of the company gave evidence in relation to the July meeting and also in relation to the final occasion on which he met the Claimant which was when the Claimant came to return his company car and phone etc to him at his Dublin's premises.

The Claimant gave evidence that his previous employment was as technical manager with an automotive paint company. He had no previous experience of the building industry. He hoped to learn on the job and initially he enjoyed site work. He did not see surveying as being part of his job when he started off and indicated that his job was primarily to bring paint to the crews. He gave evidence in respect of the various jobs that were criticised by the company. In virtually all of them he felt that a third part, that is another employee of the company was ultimately at fault for any problem that existed and that none of those issues could be laid at his door.

He acknowledged that he had secretly recorded a conversation with a member of the management team of one of the companies clients and said that he did so for his own benefit so that he could explain to his employer the difficulty he was having with that client.

Determination:

In this case the Tribunal finds that at the time of his employment the Claimant was wholly unsuitable and unqualified for the position of technical manager of an industrial painting firm. He was placed in a role, which at that point in his career was not within his experience or capacity. This became apparent from a very early time in his employment and in July a significant meeting was held at which the difficulties that the company were experiencing with him were outlined to him and it was indicated to him that significant improvement would be required.

Other issues subsequently came to light and the company felt that it could not continue its present relationship with the claimant and resolved to dismiss him from the role of technical manager. They did give consideration however to re-employing him in a diminished role. For reasons that did not fully emerge at the hearing the parties hereto never had a meaningful conversation about the

taking on of a diminished role by the Claimant. The Claimant himself conceded that it is unlikely that he would have accepted such a role if it had been offered to him.

The Tribunal feels that all the parties in this case acted in good faith in relation to these matters but that unfortunately the Claimant was not ready at the time that he took up his employment as technical manager and was not competent to do the job required of him and in the circumstances the Respondent company was entitled to terminate his contract of employment.

In the circumstances the Tribunal dismisses the claim under the Unfair Dismissals Act. No evidence has been offered in relation to any of the other matters and consequently nothing else needs to be determined by the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

