

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE  
- **Claimant**

UD581/2008  
RP476/2008  
MN22/2009  
WT9/2009

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: Ms. K.T. O'Mahony B.L.

Members: Mr. M. Forde  
Mr. J. McDonnell

heard this claim at Tralee on 24 April  
and Killarney on 12 November 2009

**Representation:**

Appellant:  
Mr. Ted Kenny, SIPTU, Connolly Hall,  
Upper Rock Street, Tralee, Co. Kerry

Respondent:  
Mr. Michael Dowling, on the first day  
and Mr Christopher Ross, on the second day,  
both of Michael Dowling & Co. Solicitors,  
Church Street, Tralee, Co. Kerry

The determination of the Tribunal was as follows:

The first day of hearing was solely concerned with the preliminary issue of the date of dismissal. In a preliminary determination, dated 25 May 2009, the Tribunal found that the claimant had been dismissed on 5 April 2008 and, as the Tribunal had not received his claim within the six-month period starting that day, there was no jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2007. On the second day of hearing the remaining claims were pursued.

It was common case that the claimant was allowed two days annual leave at short notice in mid to

late March 2008 while the respondent was abroad as it was possible to obtain a relief driver.

### **Respondent's Case**

The respondent, who was overseas, returned home on around 27 March 2008. On 29 March 2009 the claimant phoned him to say that he would not be available for work the following week and wanted to take unpaid leave. It was the respondent's evidence that he told the claimant that he must report for work on Monday 31 March, as he could not get a relief driver at such short notice. The respondent collected the truck from the claimant's home on the evening of 29 March 2008; they had not arranged this with the claimant but they took a chance that they would find him at home and they did. The claimant did not show for work on 31 March 2008 or make any contact with the respondent until Saturday 5 April 2008 when he phoned to say he was returning to work on Monday, 7 April. The respondent told him that he had no more work for him as he had failed to come to work that week. He did not make the claimant redundant but dismissed him on grounds of his conduct in failing to show for work. The respondent subsequently discovered that the claimant spent the week commencing 31 March or at least some of it driving for another enterprise. The respondent did the relief driving during the week the claimant failed to show for work and continued with it until another relief driver was hired to share the relief driving with him. The respondent's wife replaced him in the office when he was out on relief driving. The same number of trucks continued on the road after the claimant's dismissal.

### **Claimant's Case**

It was the claimant's evidence that the respondent acceded to his request for the week of 31 March off without pay and that the respondent collected the keys as had been arranged. He was to return to work on Monday, 7 April 2008 but when he phoned the respondent on 5 or 6 April he was told that there were only two trucks on and that he would phone him (the claimant) the following Monday or Tuesday but he never phoned him after that. The claimant tried to contact him two or three times on Monday 7 April but the respondent did not answer his calls. It was his position that he did not leave a voice mail because his phone number is displayed on the recipient's phone. If the respondent had refused him the week of 31 March off he would have worked it.

### **Determination**

Whilst the Tribunal heard evidence from both parties on the issue as to whether there had been a transfer of an undertaking between the claimant's former employer and his employer in the case herein, that evidence is not set out above as, having heard the entire evidence, the issue of the employee's continuity of employment is irrelevant to the Tribunal's determination herein.

In its determination dated 25 May 2009 this division of the Tribunal found as a fact that the dismissal in this case was effected during the telephone conversation between the parties on 5 April 2008. The Tribunal is satisfied that the reason for the claimant's dismissal was his failure, contrary to specific and repeated instruction from his employer, the respondent, to attend for work on the week commencing 31 March 2008. As the dismissal was conduct related a claim for a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 does not arise. Furthermore and in any event it was not established that a redundancy situation existed at the time of the dismissal. As the dismissal was conduct related, a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise. The Tribunal has no jurisdiction to hear the claim under the Organisation of Working Time Act, 1997 as the claim was lodged more than six months after the employment ended.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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

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I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. M. Forde  
Mr. J. McDonnell

heard this claim at Tralee on 24 April 2009

### **Representation:**

Appellant:

Mr. Ted Kenny, SIPTU, Connolly Hall,  
Upper Rock Street, Tralee, Co. Kerry

Respondent:

Mr. Michael Dowling, Michael Dowling & Co. Solicitors,  
Church Street, Tralee, Co. Kerry

The determination of the Tribunal was as follows:

### **Preliminary Issue**

There was a preliminary issue in this case in that there was a dispute between the parties concerning the date of dismissal. In the form T1A submitted received to the Tribunal on 22 December 2008 the claimant gives the date of dismissal as being 31(sic) June 2008. The respondent's contention was that the dismissal occurred on 5 April 2008. A preliminary hearing was then held to establish the date of dismissal as if the employer's contention was correct the claim was lodged

outside of the sixmonth period provided in section 8 (2) (a) of the Unfair Dismissals Acts, 1977 to 2007.

The claimant took two days annual leave at short notice on 27 and 28 March 2008. This leave was not approved in advance but the respondent was able to obtain a relief driver at short notice. The respondent had been overseas on holiday and returned home on 28 March 2008. On 29 March 2009 the claimant phoned the respondent to say that he would not be around the next week. The respondent told the claimant that he could not have a week's holiday at such short notice and that he should report for work as normal on Monday 31 March 2008. The claimant replied that he would not be around the next week and it is accepted that the claimant spent at least part of the following week driving a truck for another unnamed enterprise. The respondent's position is that he warned the claimant if he did not turn up for work on 31 March 2008 his employment would be at an end. The claimant's position is that he was to phone the respondent the next weekend. The respondent collected the truck from the claimant's home on the evening of 29 March 2008 and the claimant did not turn up for work on 31 March 2008.

There was no further interaction between the parties until Saturday 5 April 2008 when the claimant phoned the respondent. The respondent's position is that he told the claimant that he no longer worked for the respondent. The claimant's position is that the respondent told him that he did not know how many trucks would be needed on Monday 7 April 2008 and that the respondent would get back to him. On 6 April 2008 the claimant was involved in a motor vehicle accident as a result of which he was unavailable for work until November 2008. The claimant submitted no medical certificates to the respondent and did not inform him that he had been involved in an accident. The respondent did not initially supply the claimant with a P45. The claimant's position is that he only discovered that he was dismissed after his wife phoned the respondent looking for his P45 some time in late May or early June 2008.

### **Preliminary Determination**

On the balance of probabilities the Tribunal is satisfied that the dismissal was effected during the telephone conversation between the parties on 5 April 2008. That being the case it follows that the claim under the Unfair Dismissals Acts, 1977 to 2007 that was received by the Tribunal on 22 December 2008 was outside the time limit of six months provided. In such circumstances there is no jurisdiction to hear the claim under those Acts

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Employment Appeals Tribunal

This \_\_\_\_\_

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