

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD160/2009
MN161/2009

against

EMPLOYER - respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. C. Gleeson BL

Members: Mr. C.A. Ormond
Mr. S. O'Donnell

heard these claims in Dublin on 23 June 2009

Representation:

Claimant(s):
In person

Respondent(s):
Mr. Conor Bowman BL instructed by
Ms. Naomi Harty, Shannon Valley Plant Hire & Associated
Companies, Unit 12, Shannon Valley Centre, Roseville,
Turvey Lane, Donabate, Co. Dublin

The determination of the Tribunal was as follows:-

The claim form lodged with the Tribunal stated that the claimant had been employed by the respondent from November 2006 to around August 2008. Giving sworn testimony, the claimant said that he had been a machine driver who had been shredding trees but that one extremely steep bank on the M50 on which he had done this had felt more steep as he went further in. His machine started to slide downwards. After this had happened five or six times he thought that it was too dangerous and he rang DE (a principal of the respondent).

The claimant told DE that it was too dangerous. The claimant was afraid that a slip would cause the fence to come through the window of the machine. The claimant alleged that DE “reared up” on him, told him to “f***” off the machine and to “f***” off home. The claimant told him the danger but DE allegedly said that he did not give a “f***” about the claimant or the claimant’s health and safety.

The claimant did not head for home. A window was broken on the machine. A man was heading out to fix it. It was common for windows to break. A tree had done it. The claimant waited for a man to replace the window. That was about four or five p.m.. The man came at about six p.m. and stayed for about a half-hour. The claimant went home. He usually finished at about six p.m..

The claimant heard no more from the respondent. He got his P45 in the post about two weeks later. He did not ring the respondent and the respondent did not ring him.

Counsel for the respondent put it the claimant that he was “blatantly fibbing” in his claim so as to help pay a big mortgage. The claimant did not accept this.

The respondent’s written defence responded to the claimant’s claim form by categorically denying all of the claimant’s allegations. Giving sworn testimony, the abovementioned DE recalled coming back from a meeting with JW (M50 project manager) when he got a call from the claimant who said that his machine was slipping down but said nothing about a window. DE told the claimant to park the machine and wait for EM (foreman) to come for an inspection.

DE denied saying what the claimant had claimed and said that he had contacted EM by phone telling him to go to where the claimant was and to look at the situation. EM told him that the machine was parked and that there was nobody there. JW heard the conversation.

DE told the Tribunal that the claimant had phoned him although he covered various areas and JW, EM and PH (health and safety officer) covered the site in question.

Giving sworn testimony, JW stated that he had been in the car when the claimant had phoned and said that the machine was slipping down and getting too dangerous. DE said that the respondent would get somebody down to look at it. JW told the Tribunal that he did not hear DE say what had been alleged. Directly after the claimant’s call to DE, DE told EM to go to check if the claimant was sliding off the embankment and to do an inspection. JW stated to the Tribunal that this was the right person to call and that the claimant should have contacted him (JW) because JW was the project manager.

Giving sworn testimony, EM said that he, being the section foreman for the claimant’s section, had got a call from DE to go to inspect where the claimant had thought that the embankment was too dangerous to shred trees. On going there, EM found the machine parked and the claimant gone. This was before 5.00 p.m.. Neither was any window-fixer there. EM tried to phone the claimant but got no reply. The claimant would have had EM’s number but did not phone EM. EM knew the claimant since May 2007 when the claimant had received a verbal warning for breaches of safety rules.

EM told the Tribunal that health and safety was PH's area but that the claimant could contact JW (project manager). EM and JW would be on-site and would look at issues. EM stated to the Tribunal that "the embankment was o.k." and that "it was finished by somebody else". Having failed to contact the claimant and not having been contacted by the claimant, EM had expected the claimant to turn up for work on the following Monday morning.

Giving sworn testimony, PH said that she had been the respondent's health and safety officer at the time in question but was now self-employed. She said that the claimant had had "disregard for safety" and that she had given him "warnings and advice" e.g. about not taking due care on-site and not having the safety pin in position while operating an excavator. The claimant was told in writing on 11 May 2007 by PH that he would be "monitored by the Foreman and by the H & S officer on an on-going basis" regarding his "safety performance".

On 7 April 2008 PH sent the claimant a written warning for not having a safety pin in an excavator and was warned that further breaches could lead to disciplinary action up to and including dismissal.

On 13 August 2008 PH sent the claimant a final written warning for "poor operation of excavator allowing it come into contact with stationary vehicle". She told the Tribunal that she had investigated this incident, that the claimant had agreed that it had been his fault and that "he did not check his environment".

PH stated to the Tribunal that she disagreed that the claimant was conscious of health and safety. She said that the claimant had been with the respondent since April 2007 and that the claimant's first non-compliance incident had been in May 2007.

Determination:

Having considered the evidence adduced, the Tribunal prefers the evidence of the respondent's witnesses and finds that the claimant did not discharge the onus that was upon him to show that a dismissal had taken place or that he was sufficiently concerned to make a significant attempt to remain in his post. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is dismissed because the Tribunal did not find the respondent to have breached the said legislation.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

