

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

CASE NO.
UD1501/2009

MN474/2009
WT210/2009

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 S. Ó Riordain
Members: Mr. M. Forde
Mr J. McDonnell

heard this claim at Waterford on 23rd July 2009
and 19th November 2009

Representation:

Claimant: Mr. Garrett Hayden BL instructed by Ms Áine O'Driscoll
Solicitor, David Burke & Co., Solicitors, 24 Mary Street, Dungarvan,
Co. Waterford

Respondent: Joseph P. Gordon & Co., Solicitors,
Burgery, Dungarvan, Co. Waterford

Background:

The respondent is a sole trader. He ran a construction type of business that mainly worked on a contract basis for a local County Council. The claimant worked driving a "Digger" for the respondent.

Respondent's case:

The Tribunal heard evidence from the respondent who is a sole trader. He told the Tribunal that he had 15 or 16 employees last year and now has 7 or 8 employees. The claimant commenced employment in October 2006. The claimant's job was specifically to drive a digger machine. He had no problem with the claimant and the claimant had no problem with him.

The claimant was with another employee working on "kerbing". On 31st March 2008 the claimant had an accident with the machine he was using to dig with. A hose broke on the digger and the claimant broke his ankle. He brought the claimant to the hospital. The claimant was out of

work for ten weeks. He paid the claimant €210.00 per week whilst he was out. The claimant returned and he was re-instated in the job where he had been on County Council related work. The Co. Council contacted him to say that they were not happy with the claimant. A County council official seemed to have a problem with the claimant. He took the claimant off the job and put another man in his place. He kept the claimant on for a few weeks. However the work dried up and he therefore had no work for the claimant. He gave the claimant a letter to give to the Department of Social and Family Affairs to say that there was no work so that he could avail of benefits. He had paid the claimant his holiday pay.

The witness was asked how much the claimant was paid and he told the Tribunal that he paid the claimant €400 per week plus €100 in cash.

The witness agreed in cross-examination that he did not give the claimant a written contract. He did not give the claimant written procedures in relation to grievance, discipline or dismissal.

The witness explained that after he took the claimant off the job the employee that replaced the claimant in the County Council was a temporary employee, however he himself and his son worked also on the job that the claimant had held.

He also explained that he kept the claimant employed for three months after he took him off the County Council work. But the work he kept the claimant on for was his own "private work" and this dried up. He agreed that the claimant would not have been dismissed but for the Council complaint. He was afraid that he would lose Council work

Claimant's case:

The Tribunal heard evidence from the claimant. He explained that he was happy in the job. He had no complaints, or was not made aware of any complaints. He was not given a contract of employment.

He explained that he suffered an injury at work in April 2008. He hit the digger off the side of a trailer. He got out of the digger to see what the damage might be and he slipped and broke his ankle.

He returned to work. The owner took him off the County Council work and did not tell him why. He felt that the official in the County Council did not want him working in the same work area as him.

The owner then put him on private work for a week and a few days. After that the owner told him that he had no more work for him and that he had better go and sign-on. County Council work continued to be carried out by the respondent.

The claimant gave evidence as to his holiday pay and his minimum notice pay.

When asked about his weekly pay the claimant explained that he was paid €600 per week, €400 of which was a cheque and €200 cash if he worked Friday, Saturday, so it was €400 for four days and €100 if he worked Friday and €100 if he worked Saturday.

The claimant gave evidence as to his loss.

Determination:

The Tribunal is satisfied on the evidence that a situation of dismissal rather than redundancy arose and it determines that the respondent has not discharged the onus to prove that the dismissal was fair. The unspecified complaint by a County Council official against the employee, which was the real basis of the termination of employment, was not substantiated. The claimant was not made aware of the complaint, or given any opportunity to have a fair hearing, with or without representation, or to respond to it; nor were there any procedures in place which would have enabled him to address the matter. The claimant was not made redundant and the work he had been doing with the Council continued. The respondent believed that he would have lost the contract with the Council unless he withdrew the claimant from Council work, but the basis of this was never pursued with the claimant or with the Tribunal.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. The Tribunal determine that compensation be the most appropriate remedy and awards the claimant the sum of €10,000.

The claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2005, succeeds and the Tribunal awards the claimant the sum of €400.00, this being one weeks pay.

The claim under the Organisation of Working Time Act, 1997, succeeds and the Tribunal awards the claimant the sum of €400.00.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)