

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
EMPLOYEE - claimant

CASE NO.  
UD395/2009

against

EMPLOYER - respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr T Ryan

Members: Mr F Cunneen  
Mr G Whyte

heard this claim at Dublin on 7th October 2009

Representation:

\_\_\_\_\_

Claimant(s):

Mr Cormac O'Ceallaigh  
Sean O'Ceallaigh & Co, Solicitors,  
The Old Bank, Phibsborough, Dublin 7

Respondent(s):

Mr Conor Bowman BL, instructed by:  
Ms Naomi Harty  
Shannon Valley Plant Hire & Associated Companies,

The determination of the Tribunal was as follows:

The respondent raised a preliminary issue in relation to the claimant's continuity of service. The respondent contended that the claimant did not have 52 weeks continuous service when he was dismissed in September 2008. The respondent contended that the claimant's absence from August 2007 to February 2008 was not agreed between the parties and that there was no agreement that the claimant's job would be there on his return.

## Respondent's Case

The claimant was employed as a driver in August 2006. In August 2007 the claimant asked a company director if he could return to Romania for two weeks to deal with some family issues. The claimant had no remaining annual leave entitlement. The director consented to the claimant returning home on unpaid leave, but told him that he was under pressure for drivers. The claimant phoned the director two weeks later to say that he might not be back. The director made it clear to the claimant that if he did not return within a month his employment would be terminated. The director heard nothing further from the claimant and issued a P45 to the claimant in November 2008. The director tried to contact the claimant but his phone was not contactable. The director believed that the claimant was in Romania.

The next communication from the claimant was in January 2008 when he rang the director looking for his job back. The director also received calls from the claimant's relatives and employees who were friends of the claimant making representations on his behalf. The company had purchased new trucks for the company, which arrived in February 2008, and so the director offered the claimant a driver's position.

The Director disputed that business was quiet in August 2007 or that the claimant was asked to stay home for a few weeks. There were no lay-offs in the company at that time, and new employees were being recruited.

The director's brother, a co-owner, gave evidence that he was not the claimant's supervisor and that he had no supervisory capacity over the drivers in the company. He was responsible for the earthworks onsite and checking new sites. The co-owner disputed that he had received any phone calls from the claimant from August 2007 to February 2008. The co-owner stated that he had received a phone call from the claimant in 2009, but not prior to that and on one occasion he had helped the claimant with the steering lock on his car.

## Claimant's Case:

The claimant gave evidence that in August 2007 the co-owner of the company told him to stay home from work for a three week unpaid holiday and that he would be called after that. The claimant phoned the co-owner after a few weeks and was told to keep waiting. The claimant had taken three weeks annual leave prior to that. The claimant stated that he received his P45 in either January 2008 or November 2007 and that he phoned the co-owner when he received it. The claimant stated that he phoned the co-owner in November and in January. The co-owner told him that the P45 was a mistake and not to worry and that he would bring him back to work in February. The claimant contended that he was never told his job was terminated.

The claimant contended that he lived on his savings and a car loan during the entire period of absence. The claimant denied that he had spoken to the director about returning to work. The claimant contended that he did not return to Romania during the period between August 2007 and February 2008.

## Determination:

If an employee is absent from his employment for a period not exceeding twenty-six weeks between consecutive periods of employment by reason of, (1) lay-off, (2) sickness or injury, or (3) by agreement, such period (26 weeks) shall count as a period of service. In the claim before the

Tribunal the claimant was absent from his employment from August 2007 until he took up employment again with the respondent on 4<sup>th</sup> February 2008.

In order for the Tribunal to have jurisdiction to hear the claim he must establish that he was absent from his employment by agreement with the employer. The claimant has not established that he had any such agreement with the employer to allow him come within the definition of computable service as set out in the first schedule of the Minimum Notice and Terms of Employment Act 1973. Therefore the claim brought under the Unfair Dismissals Acts 1977 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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