

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- appellant

CASE NO.
UD186/2009
RP179/2009
MN183/2009

against
EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Ms J. Winters
Ms. E. Brezina

heard this claim at Dublin on 16th July 2009
and 11th November 2009

Representation:

Claimant(s) : Maguire McClafferty, Solicitors, 8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent(s) : Mr. Michael Connellan BL instructed by:
Mr. John Connellan, Carley & Co., Solicitors, 10 Anglesea Street, Dublin 2

The determination of the Tribunal was as follows:-

The claim under the Redundancy Payments Acts, 1967 to 2007 was dismissed.

Claimant's Case:

The claimant gave evidence. He commenced employment with the respondent in May 2005 until October 26th 2008. He injured his back the previous week lifting bins, attended his doctor and obtained a medical certificate from October 26th to October 31st. He gave this cert to his employer (PD) who informed him that it did not matter, as he could not pay him sick leave. He applied and received sick benefit from the Department of Social and Family Affairs. He also informed PD that he would be unfit for work the following week. PD informed him that if he was unfit there was no work for him.

On October 31st he was attending a family event. He received a call from PD requesting the return of the company van and mobile phone the following day. He could not do this as he was busy but returned them on the Sunday or Monday, 2nd or 3rd of November. PD asked if and when he was fit to return to work but he replied that he was not and would get another medical certificate. PD told him it was not important, as he had no work for him. He replied that if there were no work he would return to Poland. PD told him he would contact him if there were any more work. He never did, although the claimant did contact him on a number of occasions to see if there was any work.

The claimant gave evidence of loss. He had worked from January 15th 2009 and was commencing a new job the day after the hearing.

On cross-examination he said he had told PD he had hurt his spine and felt unwell but was unsure which day this was. When asked he said he had attended a family event on Friday and Saturday in Dublin but had not made an arrangement to with MD to return the van on the Saturday. When put to him he said he could not recall telling MD he was drinking in Longford on the Saturday. He again stated that MD told him if he was unfit for work there was no work for him. He did not return to the doctor a second time as MD said he did not need a medical certificate and he had enough medication for 2 weeks.

When asked, he said MD had asked for the SIM card for the mobile phone. When put to him that MD received no calls but 2 text messages on November 4th and 30th to say he was back in the country and was looking for work, he replied that he did not remember the texts but he had called him a number of times.

The claimant was cross-examined on the mitigation of his loss. When put to him he agreed he had bought building supplies from a supplier to the respondent but this was to renovate his rented home and help out a friend to renovate a small restaurant in November, 2008, February and March 2009. He stated that he only knew he was dismissed when he received his P45. He then stated he was dismissed when he was on sick leave and only learnt about it 2 months later.

When asked by the Tribunal, he stated he was unsure when he was fit to return to work but that it was probably March 2009.

Respondent's Case:

The employer (PD) gave evidence. He explained that it was a small business with 2 employees carrying out building work.

In the January / February 2008 he had told the claimant that work could be slow in the coming months. The claimant said that he could not work for less money. The claimant informed him by voicemail on October 27th 2008 that he had injured his back and would not be in work the next day. At the time they were renovating a house that had a deadline for completion in December 2008.

The following day he was informed that the claimant would be out for a week and had a medical certificate to cover him until October 31st 2008. When asked he said that he did not need the company van that week. It was the claimant that offered to return the van the following Saturday. He contacted the claimant who informed him he was too intoxicated to drive and said he would return the van the following day at 1 p.m., which he did and handed over the SIM card of the mobile phone of his own violation. The claimant informed him he was going back to Poland to see a good doctor. He asked the claimant was he leaving and he replied that he would return on

November 14th. He received a text from the claimant with a new number on November 4th.

On November 30th he received another text informing him the claimant was back in Dublin and asked was there any work for him. He received the same text 10 minutes later. He did not respond. The claimant contacted him a number of times but the witness told him he was working and would get back to him. The claimant contacted him some time later requesting a reference and told him he was going to Canada.

On cross-examination he stated he had no major previous disciplinary problems with the claimant. He refuted the claimant had rang him on 3 occasions looking for work but had received 2 texts. He agreed it was strange the claimant had texted him his new number when he had left voluntarily. When asked, he said that he had rang the claimant on October 31st at 9.39 a.m. and at 12.05 p.m. on November 1st. He never told him to return to Poland. He stated he had no idea why the claimant left; he did have work for him. On November 10th he hired someone else to complete the urgent work.

A witness from the builder's provider to the respondent gave evidence. He stated he had seen the claimant in the builder's providers premises on various occasions purchasing stock in November 2008. He did not know the claimant had finished working for the respondent till January 2009.

Determination:

Having heard the evidence adduced by both parties the Tribunal finds that the respondent did not follow proper procedures in this case. In evidence the claimant stated that he was not fit to return to work until March 2009 because of his injury. However he conceded this by stating it was January 15th 2009 and therefore he has no loss under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal awards the claimant the sum of € 1,768.00 this being two weeks gross wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)