

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

EMPLOYEE

- **claimant**

MN743/2029

WT313/2009

RP788/2009

UD720/2009

against

EMPLOYER

- **respondent**

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr M. Noone  
Mr B. Byrne

heard this claim at Dublin on 28th October 2009

Representation:  
\_\_\_\_\_

Claimant :

Mr. Blazej Nowak, Polish Consultancy Enterprise, 19 Talbot  
Street, Dublin 1

Respondent :

Ms Mairead McKenna, B.L., instructed by McCormack, Solicitors,  
4 McElwain Terrace, Newbridge, Co. Kildare

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

At the outset the periods of employment for the claimant were established.

**Claimant's case:**

The claimant commenced his employment on 7<sup>th</sup> June 2005 and was made redundant on 29<sup>th</sup> September 2006. He then took up employment again on 9<sup>th</sup> October 2006 to 10<sup>th</sup> /13<sup>th</sup> October 2008.

The claimant worked until 13<sup>th</sup> October 2008 and after that the respondent sent text messages stating that there was no more work. He did not work for three weeks from 13<sup>th</sup> to end October. Towards the end of November he worked two/three days. In December he worked ten days between 1<sup>st</sup> and 19<sup>th</sup>.

He received a P.45 on 1<sup>st</sup> December 2008 which showed a date of leaving as 10<sup>th</sup> October 2008. He applied for a Social Welfare payment on 1<sup>st</sup> December having received his P.45. He did not ask the respondent to pay him in cash so that he could claim Social Welfare.

**Respondent's case:**

The claimant was not made redundant on 29<sup>th</sup> September 2006, he left to go to another job with more money. He came back looking for work in early October 2006 and worked until 10<sup>th</sup> October 2008. He returned to the company, after a five week period on 18<sup>th</sup> November 2008 and worked to 22<sup>nd</sup> December 2008 when the claimant stated that he was not coming back after Christmas.

Counsel for the respondent stated that as there was a break in service from 10<sup>th</sup> October 2008 to 18<sup>th</sup> November 2008 and that the Tribunal did not have jurisdiction to hear this case under the Unfair Dismissals Acts, 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007.

Counsel for the respondent stated that the reason the claimant left in October 2008 was that he wanted to sign on for Social Welfare and be paid in cash. The MD's brother had conversations with the claimant in early October and November 2008 in relation to signing on for Social Welfare. The claimant was told it was unacceptable to sign on while working. During a three-week period after 13<sup>th</sup> October there was work available.

The Tribunal heard evidence from the Managing Director (MD) in relation to October 2008

On 10<sup>th</sup> October 2008 work stopped at a site in Sallins as the scaffold was not up to standard. The site was closed for a week. They had another job at a private house in Newbridge which tied them over. In a two week period there were one or two days when there was no work. Two or three days prior to 10<sup>th</sup> October 2008 the claimant asked that he be paid in cash and that he wanted to sign on for Social Welfare. Witness told him his proposition was not acceptable and that there was work for him. He then received a text message from a housemate of the claimant requesting his P.45. Witness did not speak to the claimant after receiving the text message and his accountant issued the P.45 a week or two later. On a previous occasion the claimant left and subsequently asked for his job back. He rang the claimant in November 2008 telling him he had work available and he returned to work on 18<sup>th</sup> November. In December the claimant requested a day off to collect his

Social Welfare and his brother told the claimant he should not be signing on. The claimant followed the MD's brother home and said he wanted his tools. According to the claimant he applied for Social Welfare payments when he received his P.45 on 1<sup>st</sup> December 2008.

In answer to questions from Tribunal members, the claimant stated that when he started back working with the respondent on 18<sup>th</sup> November 2008 he did not remember if he was also claiming Social Welfare payments.

The claimant's representative stated that a Social Welfare payment was made to the claimant from 27<sup>th</sup> November 2008. According to the claimant's bank account, no payments were made from the respondent in October, November or December 2008.

In answer to questions from Tribunal members witness stated that October was not a period of lay-off for the claimant. He presumed the claimant wanted to go on Social Welfare.

The claimant was issued with 3 P.45's, the second had a date of leaving of 10<sup>th</sup> October 2008 and the third showed a date of leaving as 22<sup>nd</sup> December 2008.

The MD's brother in his evidence told the Tribunal that in or around 18<sup>th</sup> December 2008 the claimant looked for a half day and mentioned Social Welfare/ Post Office. Witness took it that the claimant was drawing the dole and said "no" to his request. On 19<sup>th</sup> December the claimant did not come in to work and that evening the claimant went to the witness' house and looked for his tools. Witness rang the MD and he took it that the claimant was not coming back.

In cross-examination the claimant stated that the respondent told him to go and apply for Social Welfare on 1<sup>st</sup> December. The claimant also denied that he asked for his tools as he was carrying them in the back of his car.

Counsel on behalf of the respondent stated that in relation to the P.45, it was an error. She did not believe the employment was continuous. There was a break in service and the claimant applied for Social Welfare.

#### **Tribunal's ruling in relation to jurisdiction:**

The Tribunal considered whether it had jurisdiction to hear the case under the Unfair Dismissals Acts, 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007. The period from 13<sup>th</sup> October to 17<sup>th</sup> November 2008 is less than four weeks and the Tribunal noted that the respondent invited the claimant back to work on 1<sup>st</sup> December. The P.45 with a date of leaving of 22<sup>nd</sup> December 2008 showed a full year's earnings. Continuity was not broken by a period of less than four weeks.

It has come to our attention that the parties obligations under Revenue and Social Welfare legislation has not been fully complied with and accordingly the Tribunal as it is required to do under Section 7 (12) of the Unfair Dismissals (Amendment) Act, 1993, "shall notify the Revenue Commissioners or the Minister for Social Welfare, as may be appropriate".

#### **The Tribunal then proceeded to hear evidence in relation to Unfair Dismissals:**

The respondent stated that he did not dismiss the claimant. On the day of his holidays on 22<sup>nd</sup>

December 2008 the claimant stated that he was not coming back.

**Claimant's case:**

The MD rang the claimant at around 7/8pm on 22<sup>nd</sup> December 2008 and told him his work was finished. He told him there was no more work for him and then he dismissed him. He received a P.45 on 1<sup>st</sup> December 2008 when the MD brought it to his house that afternoon and told him to register for Social Welfare benefit and that he would have work for him for two or three days a week. The claimant did not receive a P.45 for 22<sup>nd</sup> December 2008. He stated that nobody told him about the Christmas party.

In answer to questions from Tribunal members the claimant stated that he was paid through the Bank up to 13<sup>th</sup> October 2008. From the period 18<sup>th</sup> November to 22<sup>nd</sup> December 2008 he was paid in cash. His usual payday was Thursday however the last payment he received was on Monday 22<sup>nd</sup> December 2008 and the employer told him there was no more work. He received this money when he collected his tools and put them in the boot of his car. He took the tools home with him each night. The claimant returned to Poland in January 2008 to get some tests done and he came back to Ireland in mid January.

In cross-examination the claimant stated that in the beginning he left the tools on site. The employer then asked him to buy his own tools and car and as the tools were very expensive he never left them on site once he had purchased his own. The claimant has not worked since 22<sup>nd</sup> December 2008 and has not been able to work due to back pain. He accepted that he had taken a personal injuries claim against the respondent.

**Respondent's case:**

The MD stated that on 22<sup>nd</sup> December 2008 he told the claimant that they would meet up for drinks and the claimant replied that he was not going for the drinks and that he was not coming back to work. Witness took that to mean the claimant finished work. Around 5pm on the 22<sup>nd</sup> December they finished up for Christmas. The respondent did not tell the claimant that work was finished and he knew that work was coming up in January as there were houses to be completed. Witness did not call to the claimant's house that evening as he was in the restaurant. He sent the claimant his P.45 in or around the second week in January 2009. The claimant's wages were paid by electronic transfer. The only time he told the claimant to claim Social Welfare was while he was waiting on payment from clients and he paid employees out of his own pocket. Payslips were issued and pension payments were paid by direct debit.

In cross-examination witness stated that he paid the claimant in cash in the last week. The MD's brother verified that the claimant and a colleague were invited for the Christmas drinks.

In answer to questions from Tribunal members witness conceded that the claimant was owed one weeks holidays. In December 2008 the respondent had five employees and another employee started towards the end of January 2009. They are still working on small jobs such as extensions.

**Determination:**

The Tribunal is unanimous that the claimant resigned from his employment therefore the claims under the Unfair Dismissals Acts, 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007

are dismissed. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also dismissed. The respondent conceded that the claimant was due one weeks holidays, however in addition he is also due payment for three Public Holidays, therefore he is entitled to payment of €742.40 which is the equivalent of eight days under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

