

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NOS.

EMPLOYEE -*Claimant*

UD38/2009

R P29/2009

MN43/2009

WT22/2009

against

EMPLOYER –*Respondent*

EMPLOYER – *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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: Ms. C. Gleeson BL

Members: Mr. R. Prole
Mr. N. Broughall

heard this claim at Dublin on 25 May, 10 and 11 December 2009

Representation:

Claimant: Mr Colm McGreal BL, instructed on May 25th 2009
Ms. Ciara O'Duffy BL instructed on December 10th 2009
By: Jason O'Sullivan Gerard L. McGowan Solicitors, The Square, Balbriggan, Co. Dublin

Respondent: Mr. Paul Dunne, IBEC, Confederation House, 84/86 Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The claim under the Organisation of Working Act, 1997 was withdrawn.

The representative for the respondent argued that the Tribunal did not have jurisdiction to hear these claims because the claimant left his employment voluntarily on February 07 and returned to work on 15 August 2007. When the claimant was made redundant he had only 47 weeks service and so cannot bring a claim before the Tribunal. The claimant's P.45 cannot be located, but it would not definitively establish the

duration of his employment.

The claimant's representative responded that in calculating the claimant's service, a break of less than 26 weeks could be bridged. Also the claimant was made redundant after he raised a Health & Safety concern with the respondent, complaining of the oppressive and illegally long working hours he was expected to work. Section 6 (3) (a) of the 1977 Act applies in this case. Finally if the claimant's holiday and minimum notice entitlements are taken into account, he has the required service to bring his claims before the Tribunal.

Respondent's Case

The group HR Manager gave evidence. The group comprises three shops and two hotels. When the claimant commenced there were about 700 employees, most were students working part time.

The claimant was employed to do building maintenance/labouring work. She did not recall issuing him with a contract of employment. She generally issued contracts and conducted exit interviews. The claimant was in the building end of the business where things are done more informally. The building workers were provided with accommodation in an apartment over one of the shops and also got their meals in the hotel. For the last 4 months approximately of his employment, the claimant lived in a guest room in the hotel.

A payroll clerk looked after paying wages. A staff Manager in each location does the pay preparation and sends the information to payroll.

The claimant left in February 2007 to set up his own business. There was a party in the hotel. She remembered that he was excited. She did not remember when he started work and did not have any record of the date. She was not involved in the redundancy process and has no records of it. The staff in her remit does not have much dealing with redundancy. The building-staff has a separate manager who looks after human resources issues.

She could not explain why no tax was deducted for the claimant for 14 weeks after his return to work.

The Maintenance Manager gave evidence. The claimant was anxious to return to his homeland and to set up his own business. He bought a new vehicle, some tools and the Managing Director offered him some old scaffolding to take home with him. No agreement was made between the claimant and the respondent company for him to take time off to go home and set up his business. All staff and some of the suppliers were aware he was leaving. The claimant even organised his own leaving party and left in February 2007.

One of the other employees left with the claimant and drove them both home to Romania. He spoke to the claimant by phone and heard his business was going well. As work was scaling down with the respondent company the claimant was not replaced. The renovations on the hotel ceased in April 2008. However there was a major fire and the premises had to be renovated once more. Some of the other employees had left so the respondent hired some temporary staff to carry out the work.

One day in early August 2007 he visited the hotel in Balbriggan where the claimant had worked. He was surprised to hear the claimant had returned and was staying in the hotel. A few days later he spoke to the claimant who asked if there was any work for him. The witness asked why the claimant had returned to Ireland and was informed that he had returned for work. The witness said he would have to speak to the Managing Director. The claimant returned to work in the hotel in late August 2007. The hotel reopened for business in September 2008 and the temporary staff were let go. The claimant was let go in July 2008 for reasons of redundancy and received all monies owed to him.

On cross-examination he stated the claimant carried out general maintenance work, painting and tiling. When asked, he stated the respondent had hired sub-contractors to carry out the paintwork after the fire. He stated the claimant was treated well, did not work excessive hours and was given free board and lodgings.

A former colleague of the claimant's gave evidence. He had shared a house with the claimant in the past while employed by the respondent. He had asked the Managing Director for a position for the claimant.

The claimant told him he was buying items to set up his own company in Romania and was leaving for good. He was surprised the claimant was leaving a good job. He kept in contact with the claimant and heard his business was doing fine. However when he returned he told the witness that he business had not been doing well.

On cross-examination he stated he had not worked nights but remembered the claimant had on occasions but would not have to attend work early the next day. When asked he said that he had not expected the claimant to return to Ireland to work for the respondent. The witness explained that he was still employed by the respondent and carried out general maintenance in the hotel and another premises in Balbriggan.

The lady employed by the respondent to carry out the payroll and administration. She would be informed of the hours the employees had worked, annual leave requests and monies due were calculated and paid. Staff were paid on a back week system. Payslips are printed on a Wednesday and distributed on a Friday to all staff. The claimant never made a complaint of not receiving a payslip.

On cross-examination she stated all maintenance employees were submitted to the payroll section by word of mouth. Paper records were kept for other staff.

The Managing Director gave evidence. He said that although he employed hundreds of staff he knew the claimant and knew he could speak English. The claimant had never been ill treated, the witness had even provided him with free board and lodgings. The witness told the Tribunal that the claimant had been considering setting up his own business at home for some time and had been acquiring tools and machinery for that purpose. He left the respondent's employment in February 2007. It was never agreed to be an agreed absence from work. The witness said he did not expect to see the claimant again and was surprised to see him in the hotel in August 2007.

They spoke about work and it was explained to him that there was very little work available. He went on an annual holiday returning on August 13th 2007 to meet the claimant who, having been offered a position, commenced work the following day.

In April 2008 a fire broke out in the hotel. It was calculated it would take twenty weeks to repair the damage. The first ten weeks comprised of cleaning out the hotel. He obtained the services of a sub-contractor he had used in the past to carry out the majority of the work as "speed was of the essence".

In July 2008 he told the claimant that due to the downturn in business he had no more day work for him but that there was some night work in a premises in Palmerstown if he wanted it to tide him over till he got another job.

On cross-examination he stated it was his decision to let the claimant go as he had no further work for him.

Claimant's Case:

The claimant gave evidence with the assistance of an interpreter. He commenced employment with the respondent in 2000 carrying out general maintenance and painting. He also carried out some night security work in later years. He complained of having to carry out night then day work the following day but nothing was done. He was sworn at and told to go home. In February 2007 he returned to Romania to set up his own business and had intended to return. He stated he had paid house gas and electricity bills while employed by the respondent.

On cross-examination he stated that there had been no agreement with the Managing Director or his brother for him to return to work for the respondent in 2007. When asked if he agreed he had taken a break in service in 2007, he replied that it had just been a small break as he had not been home to Romania in six years. His intension was to return and his brother would run the business.

When asked when he met the Managing Director on his return to Ireland he stated it was on July 22nd but was unsure which airport he arrived to.

Determination:

Having heard all the evidence adduced by both parties over the duration of this hearing finds that the claimant had left of his own accord in February 2007. He returned to Ireland in August 2007 and was able to obtain further employment by the respondent, however this came to an end in July 2008 by reason of redundancy.

As these are the facts of the case the Tribunal finds the claimant did not have one years full service with the respondent and therefore cannot make a claim under the Unfair Dismissals Acts, 1977 to 2007. Accordingly, the claim fails. The claims under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 were dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)