

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE –**Claimant**

UD1180/2009
RP1359/2009
MN1186/2009
WT527/2009

against

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: Mr. J. O'Connor

Members: Mr. P. Casey
Mr. J. Flavin

heard these claims at Tralee on 20 May 2010

Representation:

Claimant:

Ms. Fay Revington B.L. instructed by Mr. Michael Stack,
Gerald Baily & Co. Solicitors,
Church Place, Church Street, Tralee, Co. Kerry

Respondent:

Mr. Liam Ryan, Sheehan Ryan & Co. Solicitors,
61-62 New Street, Killarney, Co. Kerry

The determination of the Tribunal was as follows:

The claimant was employed by the managing director (MD) of the respondent, when MD was a sole trader, from September 2001. Some time in 2007 the respondent was incorporated and the employment transferred to the respondent. At all times the claimant was employed as a machine operator and truck driver. From the beginning of 2008 the claimant was principally employed operating a wheeled excavator on work for Tralee Town Council (the town council). The respondent was the town council's provider of a wheeled excavator service for 2008. The respondent had seven other machine operators in 2008, three of whom are sons of MD, plus a

labourer. The respondent also provided a wheeled excavator service to the county council and a utility company. Apart from MD's sons the claimant was the longest serving employee. There was no written contract of employment.

In December 2008 the respondent became aware that their tender for the provision of services to the county council was likely to be unsuccessful. It is the respondent's position that MD told the claimant of this at the time. The failure of the respondent's tender for the county council work was notified to the respondent during the first week of 2009. This represented some 30% of the respondent's workload. It is the respondent's position that the claimant was told of this failure that week. The claimant's position is that he was told of the failure on 12 January 2009 when MD asked him to approach a relative of the claimant who worked for the town council in relation to the town council tender. His position is further that on 14 January 2009 MD told him that the excavator would not be required by the town council after Friday 16 January 2009.

On 19 January 2009 the respondent issued a letter to the claimant stating that, being unable to offer full-time employment for the foreseeable future, the claimant was laid off from 20 January 2009. The claimant consulted his trade union and on 23 January his union representative drafted a letter to the respondent asserting that, as the claimant was the longest serving employee, workers with less service should be put on lay off first. The claimant delivered this letter to MD on 26 January at which stage MD was unwilling to accept the letter. The claimant's position is that MD told him that as a particular machine operator (PO) was married there was no work for the claimant.

MD offered the claimant the option of returning to work at a rate of pay some 30% lower than previously. The claimant refused this proposal saying that, whilst he was prepared to take a pay cut, this would only be if the pay cut were also imposed on the other employees. One of the other machine operators left the respondent's employ at this time and two others had been let go by the end of February 2009. PO remained in the employment until October 2009 and was taken back in March 2010.

Determination:

During the hearing the claimant told the Tribunal that he was satisfied with the annual leave he had received during the employment. Accordingly, the Tribunal finds that the claim under the Organisation of Working Time Act, 1997 was withdrawn.

The respondent conceded the fact of redundancy during MD's direct evidence. The Tribunal accepts that a redundancy situation existed in the respondent on 19 January 2009. Not only did the respondent purport to lay off the claimant but also another operator was released at the same time and two other operators released within six weeks. However the Tribunal is not satisfied that the selection of the claimant as a candidate for redundancy was fair. The respondent asserted that operators were tied to the clients for whom they provided a service. The claimant asserted that MD had said that PO was retained because of his marital status. The respondent did not deny this and the Tribunal accepts the evidence of the claimant in this regard. This does not represent an

objective criterion for selection. It must follow that the dismissal, which the Tribunal finds was effected on 20 January 2009, was unfair. The Tribunal awards €12,000-00 under the Unfair Dismissals Acts, 1977 to 2007.

Claims under the Unfair Dismissals Acts and the Redundancy Payments Acts being mutually exclusive the claim under the Redundancy Payments Acts, 1967 to 2007 must fail.

The Tribunal finds that the claimant was given notice on 14 January 2009 and therefore awards €1,719-00, being three weeks' pay, under the Minimum Notice And Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)