

CORRECTING ORDER

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE - *claimant*

CASE NO.
UD1550/2008

Against

RP1409/2008
MN1494/2008
WT798/2009

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. D. MacCarthy S C
Members: Mr P. Pierson
Mr G. Whyte

heard this claim at Mullingar on 10th July 2009

Representation:

Claimant: Ms Kara Turner B.L instructed by Keans Solicitors, 2 Upper Pembroke Street,
Dublin 2
Respondent: Enda O'Carroll, Wells & Carroll Solicitors, Main Street, Carrickmacross,
Co. Monaghan

This order corrects the original Order dated 28th August 2009 and should be read in conjunction with that Order.

The Gross Weekly pay for the purpose of calculating the Redundancy Lump Sum is €617.50 and not €400.00 as stated in the original order.

The award made under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is €2,470.00 and not €2,400.00.

The award made under the Organisation of Working Time Act 1997 is €617.50 and not €400.00.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

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EMPLOYEE - *claimant*

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- *respondent*

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The determination of the Tribunal was as follows:-

Opening Statements

Car sales significantly declined from the second half of 2008 and continued to decline into 2009. The claimant's sole responsibility was selling cars for the respondent. The salesman that was retained by the respondent was multi-skilled, he held extra responsibility including staff supervision, deputising for the Principal and responsibility for uploading car details to be sold

online which accounts for 32% of all car sales.

There was uneasy relationship between the claimant and the Principal from 2007 until his dismissal in 2008. A redundancy situation did not exist; a sales person was employed to replace the claimant. Unfair procedures were used throughout the redundancy process. The claimant did not have a contract of employment, terms of employment or knowledge of disciplinary and grievance procedures.

Claimants Case

The claimant was initially employed with the company from April 1997 to February 2002. He was re-employed with the respondent in January 2004 and worked alongside a second salesman. In November 2007 another salesman was employed with the same duties. The claimant did not receive a contract of employment, terms of employment or information on disciplinary and grievance procedures. The claimant received a written warning and a final warning, which was his first experience with formal disciplinary procedures.

On the 7th of November 2008 the claimant was called to a meeting and issued with a letter. The claimant was informed that due to the downturn in the economy the respondent had to make him redundant. The claimant did not receive advance warning that redundancy was a possibility or what the content of the meeting would concern. The claimant contacted his union immediately and was advised that he was unfairly selected for redundancy. The claimant returned to a meeting with the respondent later that evening and questioned his redundancy. The respondent told him that the other salesman was doing a different job, had different skills and more experience than the claimant. After attempting to negotiate the redundancy lump sum the claimant informed the respondent he would be seeking legal advice. The claimant was posted a cheque and 4 weeks later an RP50 form. The claimant through his legal representative returned the cheque to the respondent.

The claimant discovered that a salesperson was employed after his redundancy. The claimant does not believe the reason for his redundancy; the models of car the respondent sold were in demand, as a result they were least affected by the downturn in the economy. The claimant did not think it was necessary to inform the respondent that he was capable of the computer duties held by the other salesman, as the computer training he had undertaken was through the respondent.

Respondents Case

Due to the downturn in sales the Principal realised that the company could not sustain two sales executives and one would have to be made redundant. The claimant was chosen because his only duty was car sales. The other sales executive, among other duties had responsibility for Internet sales accounting for 32% of all car sales; if he was not present there was no other staff member capable of uploading the data.

At the meeting of 7th November 2008 the Principal presented the RP50 form to the claimant with the statutory redundancy entitlement amount filled in on the form. The principal asked the claimant how much money he would be willing to accept, the sum requested by the claimant was beyond the means of the respondent. The claimant informed the Principal that he would think about it but would not accept the form. Four weeks later the claimant requested the RP50 form. The Principal made numerous attempts but failed to contact the claimant after the meeting.

The Principal did not specifically inform the claimant that the lack of sales could lead to redundancies; alternative options were considered for the claimant but were not feasible. The decision was made 2 weeks previous to the meeting that the claimant and two other staff members would be made redundant. The sales executive not selected for redundancy was on a one-year contract and gave his notice around the 20th of November 2008. A new sales executive was employed to replace the previous sales executive with the same skills, which the claimant did not possess.

Determination

1. Redundancy Payments Acts, 1967 To 2007

Having given the matter careful consideration the Tribunal finds that the appeal under the Redundancy Payments Acts, 1967 to 2007 succeeds and a redundancy lump sum is awarded based on the following:

Date of Birth: 23rd October 1964
Date of Commencement: 3rd January 2004
Date of Termination: 7th November 2008
Gross Weekly Wage: €400.00

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

2. Minimum Notice And Terms Of Employment Acts, 1973 To 2005

The Tribunal finds that the claimant's employment was terminated without notice, therefore the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds. Accordingly, the Tribunal awards the claimant €2,400.00 in lieu of that notice being the equivalent to 4 weeks pay.

3. Organisation of Working Time Act 1997

The claim under the Organisation Of Working Time Act, 1997 succeeds and accordingly the Tribunal awards the claimant the sum of €400.00 being the equivalent to 5 days annual leave.

4. Unfair Dismissals Acts, 1977 to 2007

In general terms redundancy is a "substantial ground justifying the dismissal" under section 6(4) of the 1977 Act, but there are two other relevant provisions.

Section 6(3) governs unfair selection for redundancy, but the Tribunal is of the opinion that the claimant and the other employee involved had different skills and does not find that the claimant was unfairly selected under the terms of that subsection.

However section 5(b) of the amending Act of 1993 provides "Without prejudice to the generality of the subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the Rights Commissioner, the Tribunal or the Circuit Court, as the case may be, considers it

appropriate to do so - (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal.” Having heard the evidence the Tribunal was not satisfied by the respondent’s argument that fair procedures were used in the redundancy process, and makes a finding that the dismissal was unfair under section 5(b).

If the respondent has shown a “substantial ground” under the Act, and the dismissal was unfair only in the procedural sense, the Tribunal does not consider that compensation for full financial loss would be “just and equitable having regard to all the circumstances” under section 8(1) of the Act. The Tribunal award compensation in the sum of €5000.00.

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(Sgd.) _____
(CHAIRMAN)