

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**  
EMPLOYEE  
- *claimant*

**CASE NO.**  
UD2402/2009  
RP1221/2009  
MN2222/2009

against

*EMPLOYER – first named respondent*

*EMPLOYER – second named 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: Mr E. Murray

Members: Mr D. Hegarty  
Mr J. Flavin

heard this claim at Cork on 19th May 2010

Representation:

Claimant: Lillian O'Sullivan & Co, Solicitors, 48 Maylor Street, Cork

Respondents: no appearance by or on behalf of the First named respondent  
In person the second named respondent.

The determination of the Tribunal was as follows:-

These two applications came before the Employment Appeals Tribunal on the 19<sup>th</sup> of May 2010 and were heard as one case.

At the outset, the second named respondent acknowledged that whatever relationship existed between himself and the claimant was with him personally and not with any limited liability

company, and that he did not trade as a limited liability company during the course of his relationship with the claimant, accordingly he consented to an amendment of the T1A to reflect the correct employer. There was no appearance on behalf of the first named respondent however the Tribunal were satisfied that they were on notice of the hearing.

The claimant gave evidence through an interpreter that he had been employed by the first named respondent from May 2004 to September 2008 and in September 2008 he was transferred to the second named respondent. He was not given any notice of this transfer. He was neither consulted nor did he consent to the transfer but went along with it as it did not in any way affect his conditions. He was merely told he was "being sold" to the second named respondent, with the truck that he was employed to operate. After the transfer he was doing the exact same job as he had been doing previously. That is to say he was collecting cement from the premises of the first named respondent and delivering it to various customers. The only change was that his wages now came from second named respondent. He worked under the same supervisor and had the exact same working conditions. On the 15th of May 2009 the manager of the first named respondent told him that he would not be able to deliver for them anymore. He was to do one more load that day and then he was to finish up. He was told to go to the second named respondent and he would be told the reasons. He spoke to the second named respondent on the 18th of May and subsequently received a letter from him on the 2nd of June 2009 purporting to terminate his employment for misconduct. He later received his P45.

He said that he believed the real reason for his dismissal was that he had brought an application to the Rights Commissioner under the European Community (Protection of Employee's Rights On Transfer Of Undertakings) Regulations. This matter was heard by the Rights Commissioner on the 11th of May 2009 and first named respondent's attitude to him changed immediately. A letter was written on the 14th of May 2009 by first named respondent to the second named respondent in the following terms:

*"It has come to my attention that your driver (claimant) delivered concrete to a site in Cloyne, there was water added on site which had a serious negative effect on the concrete. The addition of water was not signed for and the slump was not filled in on the docket. This is a serious breach of our quality control procedures and (claimant) has been informed before of the consequences of this breach, it is pure negligence on his part. As on from today we no longer want (claimant) delivering our concrete."*

Consequent upon this letter the second named respondent wrote to the claimant on the 2nd of June 2009 advising him of his dismissal.

The second named respondent gave evidence; he had no problems with the claimant of any kind. He purchased five trucks from first named respondent and the drivers came with them. He said that none of them were working for him now; they have all been made redundant. He said that though he had no problem with the claimant, he had no choice but to do as first named respondent said as first named respondent was his only customer. He described that first named respondent had at all times controlled the claimant, given him his directions and that his own role was minimal in relation to the claimant's activities.

## **Determination**

The Tribunal unanimously finds as follows:

1. The purported transfer of the claimant to the employment of the 2<sup>nd</sup> named respondent was done without any prior consultation, or the consent of the claimant.
2. The first named respondent was at all times the persons in complete control of the claimant's employment. They supervised the day-to-day activities of the claimant and gave him his instructions and it was first named respondent who determined that the claimant's employment should be terminated. The Tribunal is of the view that they were the de-facto employers of the claimant.
3. The Tribunal finds unanimously that the claimant was summarily dismissed without proper cause or without being given a right of reply and consequently that the dismissal was unfair.
4. The Tribunal are satisfied that the claimant has taken all reasonable steps to mitigate his loss and that compensation is the appropriate remedy.
5. The Tribunal makes an award of €20,500.00 under the Unfair Dismissals Acts, 1977 to 2007 in favour of the claimant against the first named respondent and disallows the claim against second named respondent.
6. The Tribunal also makes an award of €2,341.00 being the equivalent of four weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 in favour of the claimant against the first named respondent and disallows the claim against second named respondent.
7. The claims under the Redundancy Payments Acts 1967 to 2007 were withdrawn at the commencement of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

