

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - *claimant 1*

CASE NO.
UD956/2009
RP1086/2009
MN974/2009
WT420/2009

EMPLOYEE - *claimant 2*

UD957/2009
RP1087/2009
MN975/2009
WT421/2009

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. P. O'Leary B L

Members: Mr M. Murphy
Mr O. Nulty

heard this claim at Navan on 18th March 2010
and 10th June 2010
and 20th October 2010

Representation:

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

Respondent: Ms Muireann McEnery, Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3

This case is running concurrently with an employee (claimant 1) appeal of a Rights Commissioner Decision under the Payment Of Wages Act, 1991.

Claimant's Case

Claimant 1

The first claimant commenced employment in the 1st of September 2006 as a stonemason. The claimant worked a 40-hour week, generally reduced to 32 hours due to weather conditions, he was paid hourly or by meter; the payment method varied between cash and cheque.

The claimant returned home with permission from the respondent on the 28th of November 2008 as his wife was having a baby. The claimant was moving apartments in the intervening time so had all his belongings packed in his car. The respondent was aware that the claimant would be away for between 1-3 months and had authorised the leave in accordance with that time frame. The claimant does not recall the amount on the cheque he received when he left to go home but knows it was for 24 hours work plus some additional hours that had been previously worked. Additional hours worked were not necessarily paid with the following weeks pay. The claimant was not paid any annual leave.

The claimant received the payslip dated the 1st December 2008 just before Christmas but did not receive the amount of €3000.00 as stated on the payslip. The €3000.00 would equate to extra hours the claimant worked since August, but had not gotten paid for. On receipt of this payslip the claimant contacted the respondent but his calls were un-answered and un-responded to. The claimant used an alternative phone to contact the respondent. The respondent answered and asked for an account number to put the €3000.00 into as per the payslip, the claimant text him a Polish account number. The claimant had closed his Irish account when going on annual leave. The claimant attempted to contact the respondent again after two weeks as he still had not put the money in the account, again the respondent answered when the claimant rang from a different phone number. The respondent said he had lost the claimant's account details and requested here-send them. The claimant sent the account number again, but still did not receive any money from the respondent.

The claimant returned to Ireland at the end of February and was informed there was no work for him with the respondent. The claimant disputes telling the respondent he had secured alternative employment.

The respondent said he would pay the claimant €100.00-200.00 a week to make up the €3,000.00 payable to him. The claimant collected €100.00 on one occasion. The claimant called to the respondent office for his P45 on the 24th March 2009.

The claimant did not call to the respondent's house before he returned home for Christmas. The claimant disputes that he left employment of his own accord. The claimant cannot confirm that he received the cashed cheque in his name for €1,400.00 issued around the 28th of November. As the claimant's Irish account is closed he cannot verify whether he lodged that cheque into his account. The claimant did not receive the €1,000.00 given to him in cash.

Claimant 2

The second claimant commenced employment on the 20th of March 2007, paid €100.00 per day or €35.00 per square meter. The claimant returned home for Christmas on the 18th or 20th of December 2008 using authorised annual leave. The claimant returned in the middle of January 2009. The arrangement was that the claimant would contact the respondent on his return to find out where he

would be working. The claimant rang the respondent a few times every day for a week but received no response. The claimant then contacted Social Welfare who advised him to go to the respondent office and find out if there was any work for him. The claimant was advised that if there was no work available that he should get the relevant documentation stating that there was no work available. On the 1st or 2nd of February the claimant went to the office and was issued with a letter stating there was no available until at least April 2009. After 3 months the claimant was again informed that there was no work available for him and was instructed by the respondent to get another job; that his P45 would be issued. The respondent informed the claimant that he did not pay any holidays; the claimant was not paid any annual leave or bank holidays for 2007 or 2008.

The claimant did not refuse any work offered to him by the respondent.

Respondent's Case

Claimant 1

In November or December 2008 the first claimant came to the respondent's house to collect his wages and informed the respondent that he would be going on holidays the following week; this was the first time the claimant mentioned going on holidays. The respondent was upset at the short notice as he had a lot of work to do at that time. The claimant did not contact the respondent again until March 2009 when he requested his P45; he informed the respondent that he had secured alternative employment.

The respondent met with the first claimant before his departure on holidays and noticed that his car was fully packed with all his belongings including a fridge. On this occasion the respondent paid the claimant €1,000.00 in cash and €1,400.00 by cheque (bank statements and cheque stub submitted to the Tribunal.) This amount was to cover all outstanding monies owed. It was common practice not to agree a return date when employees were going home for Christmas, but it was expected they return in 2-3 weeks. The respondent never made the claimant redundant or told him there was no work available for him.

Claimant 2

A customer informed the respondent that the second claimant's work was not up to standard and instructed that the second claimant was no longer permitted on his site. The respondent had no other job available for the claimant so instructed him to wait a couple of weeks so he could find him an alternative position. The claimant came to the respondent's house on a number of occasions looking for work but the respondent knew there would be no work for him until after Christmas. There was work available but the claimant was not permitted to work on that site. The claimant went home for Christmas and on his return in January 2009 came to the respondent's office requesting his P45 or a letter stating he was being made redundant. The respondent wrote a letter for the claimant stating that there was currently no work available for him but there would be in April 2009. The respondent contacted the claimant in February 2009 to make him an offer of work but received no response from the claimant.

Determination

Claimant 1

In relation to both the claim under the Unfair Dismissals Acts 1977-2007 and the Redundancy Payments Acts, 1967-2007 no evidence was put to the Tribunal that the type of work, for which the claimant was employed, was no longer available. The evidence was that the claimant left in early December and did not return to Ireland until some time in February or March, no evidence was given to the Tribunal that the claimant contacted his employer about his return to work or to excuse his delay in returning to work. In the circumstances it was reasonable for the respondent to assume that he was not coming back, this assumption had been reinforced by the events occurring on the 1st of December when the respondent noticed that the claimant had his furniture in the car when returning to Poland.

The Tribunal find that the Contract of Employment was frustrated by the claimant's action, therefore the claims in respect of the Unfair Dismissals Acts 1977-2007 and the Redundancy Payments Acts, 1967-2007 fail.

As a dismissal did not take place the claimant is not entitled to minimum notice, accordingly the appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

As part of the employee appeal of a Rights Commissioner Decision under the Payment of Wages Act, 1991, running concurrently with this case, the Tribunal heard evidence that a payslip, (produced to the Tribunal) dated the 1st of December 2008 reflecting the sum of €3,000.00 was issued to the claimant. This sum net of statutory deductions came to €2370.94. The respondent stated that this sum was paid to the claimant in two ways, one was €1,000.00 in cash and the second was €1,400.00 by cheque. The respondent established to the satisfaction of the Tribunal by the production of his bank statement and cheque stub that the sum of €1,400.00 was paid. The claimant denied this but failed to produce to the Tribunal, a bank statement for his brother, into who's account this sum was paid on behalf of the claimant as the claimant had closed his own bank account. The Tribunal determines that the claimant was paid the total sum of €2,370.94 in satisfaction of the sum owed by the respondent, which includes all statutory holiday entitlements; therefore the appeal under the Organisation of Working Time Act fails.

Claimant 2

The claimant made every effort to return to his employment by attending at the respondent's office in January. The Tribunal determine that the claimant was unfairly dismissed but had contributed to that dismissal by his lack of competence in the performance of his duties on his final job. However the Tribunal determine the most appropriate remedy is re-engagement and determine that the claimant be re-engaged with no loss of his statutory rights as and from the date of this order and that he should be paid the sum of €2,500.00 in compensation for his loss during the intervening period between his dismissal and re-engagement. It follows that the appeal under the Redundancy Payments Acts, 1967-2007 cannot succeed.

The claim under the Minimum Notice and Terms of Employment Acts, 1973-2005 cannot apply.

In respect of the claim under the Organisation of Working Time Act 1997 the claimant gave

evidence that he received no holiday pay in 2008 and as there was no contradictory evidence from the respondent this claim succeeds. Accordingly the Tribunal awards the claimant €2,000.00, being four weeks' pay, under the Organisation of Working Time Act 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)