

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

MN1786/2009

against

UD1897/2009

EMPLOYER - *respondent*

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms M. McAveety

Members: Mr P. Pierson  
Mr O. Nulty

heard this claim at Longford on 20th May 2010  
and 6th September 2010

Representation:

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Claimant(s) : Mr. Alan Mitchell, Alan Mitchell & Co., Solicitors, 21 Main  
Street, Longford, Co. Longford

Respondent(s) : Mr. Mark Connellan, Connellan, Solicitors, 3 Church Street, Longford,  
Co. Longford

The determination of the Tribunal was as follows:-

#### **Respondent's Case**

A director of the respondent company hereafter known as (MMcL) gave direct evidence that the company is engaged in general construction work, involving the construction of public buildings. It also carries out some private work. At the height of the construction boom the company employed 80 employees including 9 foremen. It now employs 20 employees including 2 foremen. The claimant commenced employment as a foreman in August 2007. He was the last foreman hired by the respondent and was employed specifically on a site in Coolock, Dublin. The respondent was engaged in the construction of buildings on that site for D.C.C.

Within 6 months of the claimant joining the respondent company the construction industry started

to collapse. Although work on the Coolock site had not been completed and is not now due for completion until July/August 2010 the company made a decision to make the claimant redundant. He was chosen for redundancy on a last in, first out basis and was replaced on the Coolock site by a foreman hereafter known as (RF) who had 20 years service with the company. The claimant was made redundant in July 2009 due to the collapse of the building industry and the poor economic conditions.

Under cross examination the witness confirmed that work on the Coolock site was scheduled to last for 92 weeks but it has over-ran and work is still ongoing on that site. The claimant, as site foreman was involved in recruitment of employees for that site. He confirmed that (RF) was working on the Coolock site at the same time as the claimant but (RF) was not answerable to the claimant. The decision to make the claimant redundant was an economic necessity. He confirmed that he had no difficulty with the claimant's work performance which was always 100%. He met with the claimant on 18 July 2009 and informed him of the decision to make him redundant. He denied that he told the claimant that he (the claimant) was the most expensive man on his books and he was costing the company €4000.00 per week. He denied that he discussed monies of any sort with the claimant. He confirmed that the claimant was never provided with a contract of employment. The claimant was given verbal notice of the decision to make him redundant on 18 July 2009 and received written notice the following Monday. The witness told the Tribunal that another four employees were made redundant on the same day as the claimant.

In reply to questions from the Tribunal the witness stated that no discussions were held with the claimant regarding a date for the end of his employment. The plan was to move him to another site when work on the Coolock site ended. (RF) was already working on the Coolock site when the decision was made to make the claimant redundant and he took up the claimant's duties following the termination of the claimant's employment.

### **Claimant's Case**

The claimant gave direct evidence that he is a qualified carpenter and returned to Ireland from England in 2006. He had worked as a site manager on Wembley stadium in London and was responsible for 1200 employees on that site. He was interviewed by the respondent company including (MMcL) for a job on a site in Coolock and took up his position as site manager on that site in July 2007. He was asked during the course of the interview would he see the job through to completion on the Coolock site and gave an undertaking that he would.

Following his appointment as site manager he interviewed people on a regular basis for work on the site and was involved in all the pre-contract work. Building work commenced on the site about five weeks after his appointment in July 2007. Approximately 20 employees worked directly to him. He also had direct consultation with the architect on site. (RF) came to work on the Coolock site in or around July 2008 and worked under the instructions of the witness.

On 17 July 2009 the witness was locking the site as he was due to go on two weeks holidays which were the normal builders holidays. He received a phone call from (MMcL) asking him to attend at the company's head office in Longford the following day, 18 July 2009. He met with (MMcL) as arranged. (MMcL) said to him *"I'm not going to beat around the bush, I'm finishing you up, you are the dearest man I have, you are costing me €4000.00 a week"*. (MMcL) also used foul language during the course of the conversation. The witness was in shock and pointed out the complexities of the work on the Coolock site. He would have been willing to take a reduction in pay or seek other alternatives such as a three day week but neither were offered to him. (MMcL)

said it was about money and nothing else. He was paid for his holidays but did not receive his P45 until a number of weeks after his dismissal.

He gave further evidence that he had refused work offers during his time working on the Coolock site as he had given an undertaking to the respondent that he would see the job through to completion. Work on the Coolock site has not been completed and is ongoing at present. He told the Tribunal that he was expecting to be unemployed following completion of work on the Coolock site and understood this position. He has been unemployed since his dismissal.

Under cross examination he told the Tribunal that (MMcL) emphasised during the interview process that he (the witness) must see the Coolock project through to completion. He assured (MMcL) that he would see the project through to completion and indeed refused other job offers while working on the Coolock project as he had given a commitment to see the project through to completion. He was hired specifically for that project. He denied that he would have been unhappy if he was let go once the Coolock project had been completed. He was of the view that he should have been retained in employment even if other foremen with more experience were let go as he was hired for a specific purpose. He was replaced on the Coolock site by (RF) and accepts that (RF) had more experience than him with the respondent company. He disagreed that the company operated a first in last out basis in terms of dealing with redundancy situations. He remains unemployed to date and produced evidence to the Tribunal of his attempts to secure alternative employment.

### **Determination**

The Tribunal having carefully considered the evidence adduced by both parties is in no doubt that the claimant was hired by the respondent company for the specific purpose of seeing the Coolock project through to completion. Therefore the Tribunal finds that the claimant was engaged under a contract for a specific purpose. As a consequence therefore, the Tribunal holds that the claimant was in a class of persons separate and distinct from the other foremen engaged by the Respondent. The Respondent gave evidence that in applying the last in first out policy, the consequence was the redundancy of the claimant. The Tribunal finds that in applying that policy to the claimant, by virtue of his separate classification arising from the nature of his contract of employment, the claimant was unfairly selected for redundancy.

In calculating loss, the Tribunal notes that it was initially anticipated that the project would last for a period of 92 weeks. The claimant in his direct evidence said that he had a reasonable expectation that the project would endure until March 2010. Undisputed evidence was given that the contract over-ran due to unforeseen circumstances none of which were attributable to any fault on the part of the claimant. In fact, as at the 6 September 2010, the project had still not reached conclusion. The Tribunal finds that for the purpose of assessing loss it must take into consideration the claimant's own expectation that the contract was due to be completed by March 2010.

Therefore, the Tribunal finds that the claimant was unfairly dismissed and awards compensation in the sum of €57,292.00 under the Unfair Dismissals Acts 1977 to 2007. This figure is based on a loss over a 30 week period calculated from the actual termination of the claimant's employment to the claimant's own expected termination of employment in March 2010.

The Tribunal is also satisfied that the claimant did not receive his entitlements under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and awards him a further €3819.48 being the

equivalent of two weeks pay owing under the said Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

