

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE -*Claimant*

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

CASE NO.

UD247/2010

RP465/2010

MN235/2010

WT121/2010

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S. C.

Members: Mr. J. Browne
Mr. A. Butler

heard this claim at Wexford on 1st July 2010

Representation:

Claimant: Mr. James Kavanagh B.L. instructed by O'Brien & Associates, Solicitors,
Mill House, Henry Street, Limerick

Respondent: Mr. Brendan McCarthy, 36 Deerpark Road, Mount Merrion, Co. Dublin

The determination of the Tribunal was as follows:

Claimant's Case:

The claimant was employed as an international lorry driver. On the 12th June 2009 the claimant signed a holiday confirmation form, which stated that he was due to return to work on the 4th July 2009. The claimant's flight confirmation was opened to the Tribunal. The claimant returned to Ireland on the 2nd July 2009 and he went to the respondent's office to check when he should return to work. He spoke with Mr. S of the respondent. Mr. S told the claimant to attend at the respondent's yard on the 6th July 2009.

On the 6th July 2009 the claimant attended at the yard and waited all day to receive work but none was given to him. The claimant remained in the yard throughout the day. Mr. S was usually the person who gave instructions to the claimant. He told the claimant that as soon as a vehicle was

available it would be given to the claimant. The claimant stated that it was not unusual to be waiting in the yard for work as it often occurred that another employee would be driving the lorry while an employee was on annual leave.

On Tuesday, 7th July 2009 the claimant again attended at the yard in the morning. He noticed that Mr. S was trying to avoid him. At the end of the day the claimant told Mr. S that he was going home and the respondent could telephone him when a vehicle became available, as the claimant was not paid while he waited in the yard for work. The claimant returned to the yard on a further date and attempted to speak with Mr. S, but was unsuccessful.

Some two weeks later the claimant received his P45 in the post. The claimant had not been to the yard in the intervening period. The claimant attended at the respondent's office and enquired why he had received a P45. The claimant was informed that he was dismissed and was given a letter to that effect, which was dated the 8th July 2009. This was the only letter that the claimant received from the respondent. The claimant gave evidence pertaining to loss.

During cross-examination it was put to the claimant that the letter of the 8th July 2009 was sent in the post to both addresses. The claimant confirmed the addresses were correct but reiterated that he only received the letter when he attended at the office after receiving his P45.

Respondent's Case:

Mr. S of the respondent gave evidence that due to the economic downturn a number of drivers were let go through a rationalisation process and other drivers were placed on short time. The respondent is a transport business and has deadlines to maintain. Employees sign the holiday confirmation form stating that they accept they may be dismissed from their employment, should they fail to return from annual leave. Numerous employees fail to return to work and it is for this reason that the respondent asks them to sign the form. When employees fail to return from leave it causes difficulties for the respondent. The claimant signed the form stating that he would return to work on the 4th July 2009, however he failed to return.

Mr. S stated that the claimant's flight confirmation showed that he was booked on a flight to Cork Airport, which would arrive at 9.15pm on the 2nd July 2009. It was not possible that the claimant had attended at the respondent's yard on that date. The claimant did not attend at the yard on either the 3rd July or the 4th July. Mr. S had no communication with the claimant. Mr. S instructed Ms. C in the office to write letter dated 8th July 2009 to the claimant, informing him that he was dismissed. The letter was sent to both of the claimant's addresses. Mr. S stated that the claimant did not attend at the office after he was sent his P45.

During cross-examination Mr. S stated that the claimant did not attend at the respondent's yard on any occasion. It was put to Mr. S that there was no warning given to the claimant, prior to his dismissal by the company. Mr. S stated that the claimant had signed the form prior to taking annual leave and he was aware that he could be dismissed should he fail to return. The decision to dismiss the claimant was taken by Mr. S, as the respondent must ensure that drivers return from leave.

In reply to questions from the Tribunal, Mr. S confirmed that he did not attempt to contact the claimant by telephone nor did he investigate the claimant's failure to return to work.

Determination:

It was an accepted fact that the claimant signed the holiday confirmation document stating that he would return to work with the respondent on the 4th July 2009. The Tribunal did not find the claimant to be a credible witness as it was evident that he could not have attended at the respondent's yard on the 2nd July 2009.

However, the respondent failed to follow its own grievance and disciplinary procedures in dismissing the claimant from his employment. The letter of dismissal was a fait accomplis. No prior warnings were given the claimant nor was he offered the opportunity to state his case. The Tribunal finds that the claimant was unfairly dismissed from his employment with the respondent and awards the claimant compensation in the sum of €18,000.00 under the Acts.

The Tribunal having found that an unfair dismissal occurred dismisses the claim under the Redundancy Payments Acts, 1977 to 2007.

The Tribunal finds the claimant is entitled to the sum €1,523.94 (being the equivalent of two weeks' gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Organisation of Working Time Act, 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)