

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

RP4/2010
UD5/2010
MN4/2010
WT3/2010

against

EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan BL

Members: Mr T. O'Grady
Mr. P. Woods

heard this claim at Navan on 20th December 2010

Representation:

Claimant(s) : Mr. Darach MacNamara BL instructed by Dillon Geraghty & Co, Solicitors,
"Belmont", O'Growney Street, Athboy, Co Meath

Respondent(s) : Ms. Mary Campbell, Malone & Martin, Solicitors, Market Street, Trim,
Co.Meath

Preliminary Point

The claim under the Redundancy Payments Acts 1967 to 2007 was withdrawn by the claimant's representative at the commencement of the hearing.

Preliminary Objection 1

This objection related to who the correct respondent was. It was submitted that the claim was brought against the wrong respondent in that the claimant at all times was employed by (NF) and not (DF). In circumstances where the claimant had served notice of his claim on both parties and in

circumstances where the solicitors for the respondent wrote to the Tribunal informing them that (DF's) father for whom they act is the employer, the Tribunal consented to an amendment of the T1A form.

Preliminary Objection 2

This objection related to the jurisdiction of the Tribunal. It was submitted that the Tribunal lacked jurisdiction to hear the matter in circumstances where the claimant had applied to the respondent for a redundancy payment and was now pursuing a claim for unfair dismissal. It was submitted that these claims were inconsistent with each other. This application was strenuously opposed by counsel for the claimant particularly as the claim for redundancy had been withdrawn at the commencement of the hearing and that a claim for unfair dismissal had been lodged by the claimant to the Tribunal on his T1A form. The tribunal determined that this objection should more correctly have been put to the Tribunal prior to the commencement of the hearing but nonetheless heard the application. The Tribunal determined that it had jurisdiction.

Respondent's Case

(DF) for the respondent gave evidence that the claimant's employment commenced on 10 May 2004. He was initially employed as a general labourer but his position changed to that of apprentice plasterer after a short period of time. The claimant continued working in this position and attended a number of FAS training modules as part of his apprenticeship. The claimant was due to attend FAS college in April 2009 to complete phase 6 of his apprenticeship but this was postponed until September 2009 at the respondent's request because of the heavy workload they had on hand. The claimant agreed to this postponement.

This position changed quickly and the claimant was placed on temporary lay off on 27 May 2009 due to a shortage of work. The selection criteria used for the selection of the claimant was a last in first out basis. The witness told the Tribunal that he gave the claimant his P45 at that time as the claimant informed him that he required it for Social Welfare purposes. He told the claimant verbally that this should not be taken as an indication of his dismissal. The claimant remained on lay off and was called by FAS to attend college in September 2009 to complete phase 6 of his apprenticeship. In total there were 7 phases to the apprenticeship. Between September 2009 and November 2009 the witness was contacted by FAS and asked if he was satisfied to certify the claimant as having completed his on the job training. He replied that he was satisfied to do so. The claimant did not return to work from temporary lay off as the respondent was not in a position to offer him any work and the claimant was dismissed on 11 December 2009. The claimant was given one weeks' notice in May 2009 of his lay off and received two weeks notice in December 2009 of the termination of his employment.

Under cross examination the witness accepted that the claimant was never provided with a contract of employment and was not provided with payslips. He denied that he told the claimant in May 2009 that he was being let go. He accepted that the claimant had not completed the final phase of his apprenticeship but signed him off as having completed his on the job training following discussions with FAS.

Claimant's Case

The claimant gave direct evidence that he commenced his apprenticeship with the respondent in 2005. He initially earned €320 per week which increased to €350 per week after a period of time.

By May 2009 this amount had increased to €440 per week. On 27 May 2009 (DF) telephoned him and informed him that he was being let go the following Friday. He was told that there was no more work available and he was being let go on the basis of last in first out. The claimant told the Tribunal that he was not last in as 4 or 5 other employees had commenced employment with the respondent after him. He understood this to be the end of his employment and received his P45 a couple of days later. He attended college in September 2009 to complete Phase 6 of his apprenticeship. He never got to complete the final phase of his apprenticeship. He gave further evidence that when he was let go in May 2009 (DF) never mentioned that it was a temporary lay off situation. He heard nothing from (DF) from May 2009 until December 2009. (DF) contacted him in December 2009 informing him that he had no more work for him. He has been unable to secure alternative employment since the termination of his employment with the respondent.

Determination

Having heard the evidence adduced at the hearing the Tribunal determined that the claimant was dismissed by reason of redundancy on 29 May 2009. The Tribunal determined that the date of dismissal was 29 May 2009 rather than 11 December 2009 as advanced by the respondent. The Tribunal noted that there was no communication between the parties from 27 May 2009 onwards albeit that both the claimant and the respondent sought to secure phase 6 apprenticeship training, and the respondent sought to secure for the claimant phase 7 apprenticeship training. The Tribunal accepts that the respondent acted *bona fide* in trying to ensure that the claimant finished his apprenticeship but the failure to communicate with the claimant is indicative of a termination of the employment relationship.

The Tribunal determined that the selection of the claimant for redundancy was unfair in circumstances where the selection criteria stated by the respondent being *last in first out* was not adhered to and the respondent advanced no reason for this failure. Therefore the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal awards the claimant the sum of €16,250.00 under the said Act.

The Tribunal is satisfied that the claimant did not receive his requisite entitlement under the Minimum Notice and Terms of Employment Acts and awards the claimant the sum of €440.00 being the equivalent of one week outstanding pay under the said Act. It was conceded by the respondent that the claimant had not received holiday pay to which he was entitled for the year 2009. The claim under the Organisation of Working Time Act 1997 therefore succeeds and the Tribunal awards the claimant the sum of €790.00 under the said Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

