EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD905/2009
RP1029/2009
MN935/2009
WT397/2009

against

EMPLOYER

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: Ms. N. O'Carroll-Kelly BL

Members: Mr. G. McAuliffe
Mr. P. Woods

heard these claims in Dublin on 9 March 2010 and 14 January 2011

Representation:

_____

Claimant(s): Ms. Pauline Codd BL and Ms. Nicola Andrews BL
instructed by Sean Gallagher & Co, Solicitors,
Grand Canal House, 1 Upper Grand Canal St, Dublin 4

Respondent(s): Ms. Helen Callanan, DFMG, Solicitors,
Embassy House, Ballsbridge, Dublin 4

Claimant's Case

The claimant gave direct sworn evidence that he worked as a roofer for the respondent company for over 6 years from March 2003 until April 2009. There were 4 or 5 other employees working for the respondent all of whom had less service than him. He also drove the company van. He had a 3 year endorsement on his driving license but was not disqualified from driving. The respondent was aware of this position and had no difficulty with it. His main work was carried out at an apartment complex in Blackrock and on the courts building in Parkgate St. The work on-site in Parkgate St was difficult work and the conditions were the worst he had ever endured. He was working with hot bitumen and this was being carried across beams overhead from where other workers on site were carrying out there duties. On one occasion he was approached by the safety officer on site for answering his mobile phone while walking across steel beams. He also had an issue with another contractor on the site in relation to work he had carried out with a vapour barrier. He (the claimant) had completed his work and heavy snowfall resulted in his work being destroyed. No disciplinary action was taken against him in relation to the two issues but he was informed by the respondent that the main contractor did not want him on site. Resulting from this he moved to other private jobs which the respondent had on hand.

In March 2009 he was told by the respondent that work had slowed down and he was placed on a 3 day week. No other employee was put on a 3 day week. On the 17 April 2009 he was then informed that he was being let go. He was informed that if more work became available he would be contacted. He did not receive any notice of his dismissal. On the 17 April 2009 and 19 April 2009 he exchanged a series of text messages with his employer but he understood from these messages that his job was gone. He received a further text message on the 20 April 2009 informing him that his P45 had been left in his car. He checked his car following the receipt of this message and discovered his P45. There was no letter accompanying the P45. He was owed 6 days holiday pay at the time of his dismissal which he has never received. He received a letter on the 13 July 2009 informing him that the situation regarding his dismissal from work was only temporary and as soon as work picks up he would be contacted. This letter was did not accompany his P45 which he received on the 20 April 2009. Following his dismissal he wrote to the respondent requesting payment of redundancy, minimum notice and holiday pay. He received a reply to this letter by way of a letter dated 28 April 2009 from the respondent informing him that his lay off was temporary and his P45 was issued in error. An RP9 form in respect of a temporary lay-off situation was enclosed with that letter.

Respondent's Case

Giving sworn testimony, the respondent's principal (hereafter referred to as GOC) said that, after working for his father since the age of thirteen, he started a company on his own as a roofing contractor in 2002. In 2003 he was introduced to the claimant who learned the work as he went along.

In 2007 or 2008 the claimant told GOC that the claimant's mother's city council housing rent was

some eight thousand euro in arrears and that she could be put out. The claimant asked to be put on a three-day week and to get cash for two days. GOC said no. GOC asked what three days the claimant wanted and said that the respondent could not work on wet days.

On 1 April 2009 the claimant came to GOC's home with documentation for GOC to sign to put the claimant on a three-day week. GOC consulted someone (MK) on this and agreed to sign to put the claimant on a three-day week.

In mid-April 2009 GOC met the claimant in Dublin's Cumberland Street area, said that things were slack and that only one company (LR) had work for the respondent. The claimant got annoyed when he heard about the reduction in work. GOC told the claimant to take his lay-off as only temporary. The claimant kicked the side of GOC's car as GOC left. The claimant was the employee with longest service but LR would not have him on-site.

After he had spoken to the claimant GOC received a text message (8.26 p.m. Friday 17 April 2009) from the claimant stating that this situation was "a joke" and that the claimant wanted the holiday money and P45 to which he was entitled. GOC had not told the claimant that he was getting his P45. GOC had mentioned temporary lay-off but had not intended to lay the claimant off permanently. The claimant was adamant that he wanted all money owed to him and redundancy.

GOC told the claimant that the lay-off was only temporary but did give a P45 telling the claimant that he would probably need a P45 if going to Social Welfare. Within a week GOC was told that the respondent should, in fact, have sent the claimant a RP9 form instead. Part One of the P45 was never sent to the Revenue Commissioners. The claimant was still adamant that he was looking for redundancy. GOC told him that the lay-off was only temporary.

Regarding driving, GOC told the Tribunal that the claimant had been driving vans for him and had done so on a provisional licence. Years later, the claimant passed the test and showed GOC the pass certificate. GOC said that this would help with insurance but knew nothing about any endorsement. When he learned of the endorsement the claimant said that he would copy part of his own licence and part of his girlfriend's licence. GOC said no to this and the claimant stopped van-driving for the respondent because, if there was a problem, the claimant could walk away but GOC could not.

Regarding LR (the abovementioned roofing company), GOC told the Tribunal that he had been pulled up over the claimant being on the phone and taking a long time for breaks. GOC got all his employees together and spoke to them about the length of breaks. Workers had to clock in and out. Some were not clocking out.

GOC was also told about unhappiness with the claimant's work. He found some of the claimant's work to have been rushed. The claimant spoke about the weather but GOC asked him to stick the roof felt so that OB and MJ (both from LR) could not come along and lift it.

One morning GOC was driving when he get a call from the claimant about MJ who said that he would "kill the c**t" if he did not leave the site where MJ was. GOC told the claimant to go to another part of the site away from MJ. However, the claimant left the site. GOC told him that he should not have left the site.

GOC told the Tribunal that GOC carries the can when one of his employees leaves a site but that he

did not dismiss the claimant or give him a final warning. He would not dismiss him for this or for using his phone. He would just tell him to please get off the phone. He had heard from OB (of LR) about the claimant being on the phone.

Asked by the respondent's representative if the claimant had been selected for temporary lay-off for any reason other than suitability, GOC said no but that the respondent had work coming up. OB had just wanted two men on LR's site. Work would have come but GOC had nothing for the claimant at that time. GOC did not want to be left stuck for men subsequently either.

Regarding the three-day week GOC and the claimant had discussed it but not on the terms that GOC wanted. GOC told the Tribunal that the respondent could not have a man on a three-day week when the respondent's work was open to the elements.

Determination:

The Tribunal has considered the evidence and the documentation submitted over the two-day hearing. The claimant was issued a P45 on 17 April 2009. It is clear from the evidence that it was issued in error. It is also clear that, once the error was identified, the correct form, RP9, was issued. The issuing of a P45 during a period of lay-off does not necessarily amount to a termination of that employment. The text messages that were sent between the parties fully support the respondent's evidence.

It is clear from the text messages that the lay-off situation was temporary and that there would be work for the claimant in the near future. It is also clear that the claimant refused to take up the offer of work until such time as he was paid his redundancy. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

No redundancy situation existed and, therefore, the appeal under the Redundancy Payments Acts, 1967 to 2007, also fails.

It was not established to the satisfaction of the Tribunal that the respondent was in breach of the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and, therefore, the claim under the said legislation fails.

It was agreed between the parties that the claimant had an outstanding entitlement to two days' holidays. The claim lodged under the Organisation of Working Time Act, 1997, succeeds and the Tribunal awards the claimant the sum of €267.95 (this amount being equivalent to 0.4 weeks gross

pay at €669.87 per week) under the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)