

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE - *claimant*

**CASE NO.**  
UD2387/2009  
RP2728/2009  
MN2209/2009  
WT1011/2009

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 G. Hanlon

Members: Mr M. Murphy  
Ms. A. Moore

heard this claim at Cavan on 18th February 2011

Representation:

Claimant: Mr Gabriel O'Toole, Evelyn O'Donnell, Toolan & Associates, Solicitors, Arva,  
Co Cavan

Respondent: Helena Brady, Brady Solicitors, Ballinagh, Cavan

The determination of the Tribunal was as follows:-

**Claimants Case**

The claimant gave direct sworn evidence. He commenced employment with the respondent in September 2003 as a general operative. During his employment with the respondent he completed his ticket for diggers, plant hire and obtained his license for rigid and artic trucks. After this he drove trucks for the respondent.

He considered himself to be a fulltime employee; from September 2003 to December 2005 he worked continuously for the respondent. In 2006 he worked 45 weeks. In 2007 he worked 25 weeks as he was laid off temporarily while the company was waiting for work to come in. During 2007 he received a letter from the respondent to allow him to sign on for social welfare, copy of which was produced into evidence. He returned to work in 2007 when the respondent telephoned him to inform him work was available. He was also temporarily laid off in 2008.

On Thursday 21<sup>st</sup> May 2009 he received a text message from the respondent telling him to take tomorrow off and to sign on for social welfare. The claimant still had the text message on his mobile telephone "sine on one more load tar". Social welfare informed him he would need a letter from his employer so he requested one from the respondent. On Tuesday 25<sup>th</sup> May he went to get the letter from the respondent and he was given his P45. This had never happened before when he was laid off so he took to mean that that he was no longer employed by the respondent.

On a number of occasions he made contact with the respondent in respect of his redundancy payment. On the 13<sup>th</sup> June the respondent informed him that he would look into it. On another occasion the respondent told him he would give him half in cash, he also had a letter for him to sign to agree to this. The claimant informed the respondent that he was entitled to his full redundancy. The claimant thought this might have been the last interaction he had with the respondent in respect of his redundancy. He informed the respondent he would be taking the legal route to obtain his redundancy entitlement. He had communicated with the respondent about 5 to 7 times in respect of his redundancy and at no stage did the respondent give him any indication that he would be returning to work for him.

A letter from the respondent to the claimant's legal representative dated 30<sup>th</sup> October 2009 was produced into evidence. This letter states that the claimant was temporarily laid off on the 22<sup>nd</sup> May 2009, the claimant refuted this and at no stage was he informed of this. On 13<sup>th</sup> August 2009 he received a text from the respondent "U can start back Monday on old job have work on now". The claimant could not return to work for the respondent, as he no longer trusted him.

He has a mortgage protection policy, and asked the respondent to complete a form to enable him to claim on this policy. The insurance company also wanted a letter from his employer stating that his employment was terminated; the claimant never received this letter so never got to claim on his policy. A letter from the insurance company to the claimant dated the 13<sup>th</sup> November was produced in evidence. This states, "your former employer only confirmed in an employment questionnaire that the unemployment reason was due to you being temporary". The claimant was never aware during the course of his employment that he was engaged on a temporary basis.

The letter from the respondent to the claimant's legal representative of the 30<sup>th</sup> October 2009 was referred to again. This states, "When he was asked back to work he refused to return. Instead he requested a P45 and stated that he needed same in order to claim both social welfare payments and mortgage protection insurance, and the P45 was issued to him. Approximately 3/4 weeks later he received holiday pay due to him and at this point he indicated that he wanted "redundancy money". *The claimant* was informed that there was no work for him but he said he had jobs to do at home first and would return to work in a few weeks." The claimant accepted he had received his holiday pay but refuted the sequence of events in this letter, and confirmed that he had not been asked back to work until August.

Under cross-examination he refuted that the respondent had telephoned him on Thursday 21<sup>st</sup> May 2009 and informed him he was needed in work on the following Monday. He denied that he had insisted on his P45. He never received any payslips while in the respondents' employment but had received his P60s.

### **Respondents Case**

The director of the company gave direct sworn evidence. The respondents are a civil engineering company. He recruited the claimant in 2003. He recalled the events of May 2009. The contract at

the time was a water pipeline in May it was 90% done, the claimant was doing all the truck work. On the Thursday 21<sup>st</sup> May 2009 the claimant was off sick, he texted the claimant and told him to take Friday off as well, he was shocked when the claimant texted him and said you are letting me go. He was annoyed he knew the job was just finished but he would have kept the claimant on. He had about 12 other employees at this stage. About two weeks later the claimant requested his P45, he did not want to let the claimant go. The claimant telephoned him about his holiday pay and he paid him. He did not give the claimant notice, as he was not letting him go.

For the first two years of the claimant's employment he was continuously employed after that he could not say whether his employment was continuous. The claimant had mentioned redundancy and he spoke to his accountant about this and they had advised him that he was not closing the company down. A new contract started on the 10<sup>th</sup> August 2009 and he offered the claimant work on the 13<sup>th</sup> August but the claimant would not return.

At one stage he had offered the claimant redundancy but when he looked in to it he realised that the claimant was not entitled to it, the redundancy amounted to €6000.00 and he could not afford that. He did offer €3000.00 but later he decided he would take the claimant back. When he offered the claimant his job back, the claimant said he wanted 2/3 weeks at home and he would come back to him. He felt bad about the insurance form but if he had given the claimant a letter stating he was redundant he would only be shooting himself in the foot.

Under cross-examination he did not accept that the claimant's employment ended on the 21<sup>st</sup> May 2009. The claimant would not come back to work on the Monday so the text he sent in respect of signing on, was a spur of the moment reaction, he was annoyed as the contract they were working on was not finished. He insisted that he did not tell the claimant to sign on, that was the route the claimant chose to take. He would have given the claimant a temporary lay off letter but the claimant wanted his P45. He was aware that he would be due a refund on the claimant's redundancy. He was referred to an insurance form he had completed on behalf of the claimant, this states that the claimant would have been aware of this impending unemployment from the 5<sup>th</sup> May 2009; he was unsure why this date was put in. He was only trying to help the claimant. His secretary would have completed these insurance forms. He confirmed he had offered the claimant €3000.00 to clear up the situation.

In reply to questions from the Tribunal he was referred to another insurance form that he had completed on which he had confirmed that the claimant was employed on a full-time permanent basis and while on the latter insurance form he had stated that the claimant was on a temporary contract. This appeared that the status of the claimant's employment had changed in a matter of months. He reiterated that it was his secretary who had completed these forms. He was also referred to his letter of the 30<sup>th</sup> October 2009 where he stated that the claimant was temporarily laid off; in reply he said this was a mistake and that the claimant left of his own free will. He had offered the claimant €3000.00 whether he was entitled to it or not, he not questioned the figures at the time. He could not recall when the claimant had received his P45.

### **Determination**

Based on the evidence adduced at the hearing the Tribunal accept that the claimant was on temporary lay off when he requested his redundancy. The respondent did not deal with this request as required in the said Acts. The Tribunal unanimously find that the claimant was made redundant and awards the claimant a statutory lump sum under the Redundancy Payments Acts 1967 to 2007 based on the following:

Date of Birth: 21<sup>st</sup> January 1975  
Date of Commencement: 15<sup>th</sup> September 2003  
Date of Termination: 21<sup>st</sup> May 2009  
Gross Weekly Wage: €605.00

This award is made subject to the claimant being in insurable employment under the Social Welfare Acts during the relevant period. A weekly ceiling of €600.00 applies to statutory redundancy payments.

The claim under the Unfair Dismissals Act 1977 to 2007 fails and accordingly is dismissed. There was no evidence adduced during the course of the hearing in respect of the claim under the Organisation of Working Time Act 1997 therefore this is dismissed. An employee who claims a redundancy payment due to lay off is deemed to have voluntarily left his employment and there not entitled to notice under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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