

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **claimant**

UD256/2010

against

RP469/2010

EMPLOYER - **respondent**

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Herlihy

Members: Mr. B. O'Carroll  
Mr. F. Dorgan

heard these claims at Castleconnell on 18 October 2011

Representation:

Claimant:

Mr. Melvyn Hanley, Melvyn Hanley Solicitors,  
16 Patrick Street, Limerick

Respondent:

Ms. Muireann McEnery, Peninsula Business Services (Ireland) Limited,  
Unit 3, Ground Floor, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows: -

The claimant, who had previously been employed by the respondent on a temporary basis in 2004, was employed as a truck driver from 24 August 2006. At this time the respondent had eight drivers and its main work involved the transport of fly ash from a power station to a cement factory and the transport of the bulk cement to various locations around the region. The trucks are bulk powder tankers.

By February 2009 as a result of the economic downturn and the subsequent drop in demand for its services there was no longer full-time work for eight drivers. One of the eight was on long-term sick leave from early in 2008. A second was made redundant from February 2009 the remaining six drivers were put onto a week on week off basis.

In April 2009 the respondent imposed a ten per cent pay cut across the board that applied to all staff including the drivers. Whilst it is accepted that one of the directors of the respondent (OD) met the drivers to discuss the necessity for the pay cut it is the claimant's position that there was no agreement on the matter and that OD was to produce a written proposal. It is common case that no such document was produced.

At the beginning of July 2009 the respondent decided to reduce the number of active drivers from six to three. The candidates for redundancy were selected on the basis of LIFO and given two weeks' notice of this on Friday 3 July 2009. The claimant as the second most junior in terms of service was one of the three selected.

On or around Tuesday 14 July 2009 the claimant was asked to work Saturday 18 July 2009, as one of the drivers who were to remain was unable to work that day. The claimant declined this offer of work when the claimant wanted the respondent to extend his period of notice by a week to 24 July 2009. The most junior driver (JD) whose position had also been declared redundant and who had insufficient service to qualify for a redundancy lump sum payment agreed to perform the work on 24 July. JD kept the truck at home, which was near to where the work had been done, on Saturday 18 July 2009.

When OD telephoned JD on Monday 20 July 2009 about the return of the truck JD was not in a position to return it, as he was involved in other work on his own account that did not involve use of the truck. Before OD could make arrangements for the collection of the truck work was offered to the respondent, which involved participation in a trial to reduce pollution from a power station. The truck was needed, not to transport material, but as part of the processing of product by means of the pumping system on the truck which was to be left on site most of the time. The work involved being on stand-by until processing was required. JD lives some ten miles from the location where this work was to be carried out and the claimant some 40 miles away. OD offered this work to JD who accepted it. The respondent's position is that the work was not offered to the claimant as he chose to offer it to JD on the operational basis that it was much more convenient to have someone on stand-by from ten miles rather than from 40 miles. The claimant's position is that he would have accepted the work if it had been offered to him.

## **Determination**

There is no doubt that on 3 July 2009 when the claimant was given notice a genuine redundancy situation existed in the respondent and that he had not been unfairly selected for redundancy as he was the second most junior of the three chosen on the basis of LIFO. The claimant's employment ended, by reason of redundancy, on 17 July 2009. The stand-by work did not arise until 20 July 2009 and in fact began the following day by which time the claimant was no longer an employee and the respondent no longer under an obligation to consider him for that work. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

The claimant received a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 which was based on a gross weekly pay of €500. It was conceded on behalf of the respondent that this figure should have been higher. Having considered the matter by examining the documentation provided by the parties the Tribunal is satisfied that the claimant is entitled to a lump sum payment based on the following criteria

Date of Birth	31 March 1957
Employment commenced	24 August 2006
Employment ended	17 July 2009
Gross weekly pay	€538-00

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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