

EMPLOYMENT APPEALS TRIBUNAL Final

CLAIM OF:
EMPLOYEE-Claimant

CASE NO.
UD2225/2009,
WT934/2009

against

EMPLOYER-Respondent

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O' Mahony B.L.

Members: Mr J. Killian
Mr D. McEvoy

heard this claim at Tralee on 15th April and 28th June 2011

Representation:

Claimant : Ms Norene Browne B L instructed by
Padraig J O'Connell, Solicitors, Glebe Lane, Killarney, Co Kerry

Respondent : Mr Michael McNamee B L instructed by
Catriona Byrne & Co, Solicitors, 3 Millbank, Blessington, Co. Wicklow

The determination of the Tribunal was as follows:

Summary of Evidence

The respondent was established in 2004 and in tandem with the construction industry grew rapidly. That growth allowed it to recruit the claimant as a quantity surveyor in the spring of 2008. One of the directors of the company who was a civil engineer (Director T) and who had up until then performed the quantity surveying function for the respondent, trained and initially worked closely with the claimant. The claimant's role was to prepare estimates, record and submit projected costs on a monthly basis for submission to the respondent's clients. While that valuation was undertaken on a monthly basis the respondent was unable to effectively submit a bill of costs to its customers unless and until a cumulative statement going back over the previous twelve months was included in that submission. The claimant was the only employee who recorded and stored that information and no back-up files or copies of it were available. It was a term of the claimant's contract of employment that a car and travel expenses would be provided to him in the course of his employment.

By the summer of 2009 the respondent's business, in line with the building sector, was in sharp decline and having cash-flow problems. Apart from dwindling and minor contracts it only had one large contract with its main client at that time, being linked to the realignments and construction of the M7 motorway. Because of internal changes in the main client it was not making timely payments to the respondent. In an effort to reduce costs the respondent decided that Director T would subsume the claimant's function and that the claimant would be made redundant. While Director T was not a qualified quantity surveyor he was experienced and capable of performing the claimant's duties and had been doing so prior to the claimant's commencement with the respondent.

It was common case that, on 23 June 2009, the two directors met with the claimant and he was given verbal notice that his employment with the respondent was to be terminated as the company could no longer guarantee his wages. It was the claimant's position that Director W (MD), who was the managing director, informed him that his dismissal would take effect the following Friday, 26 June and promised to pay him €2,000 out of his own pocket in respect of expenses owing to him and asked him (the claimant) to hand over the project files to him the following morning.

The claimant's position was that in the last week of June he made a number of unsuccessful attempts to meet with the directors to hand over the laptop, files and relevant material as well as to receive his expenses but the directors failed to meet with him for the hand-over at any time during that week. MD sought to meet him on Friday but he was on his way home at the time and he asked MD to lodge the money owing to him in his account. The money was not lodged in his account. The claimant formed the view that the respondent had no intention of paying him. The claimant retained the files and laptop sought by the respondent together and company vehicle. A letter dated 30 June 2009, signed by MD and addressed "To whom it may concern" stated that the claimant was employed by the respondent up until 30 June 2009.

In his letter dated 6 July 2009 to the claimant, MD: confirmed to the claimant that he was given one month's notice of the termination of his employment as and from 26 June 2009, asked him to work out his month's notice in head office to facilitate the transition of his functions back to Director T and reiterated that he would pay his June salary and outstanding expenses at the end of the month's notice. It was the respondent's position that despite a number of further requests the claimant did not come to head office and the respondent, having no access to its file or laptop or no copies of those files, could not prepare its cumulative valuations. The respondent discussed its problem with its main client, who recommended a consultant quantity surveyor (QS) to the respondent to undertake the necessary reconstitution of the valuation work.

The respondent's position, which was confirmed by QS, was that it retained QS on a part-time consultancy basis from around mid August up to 25 September 2009 and that his function was to prepare the cumulative valuations. QS's position was that he was seriously disadvantaged by the lack of files and drawings and did not know where the claimant had left off in the work. He contacted the claimant but he refused to return the files because of his dispute with the respondent. QS was forced to revert to first principles and reconstruct the files. He had completed this task by the end of September 2009. QS subsequently did some work for the respondent on contract claims for additional costs. QS's evidence was that he had never been an employee of the respondent, he submitted invoices to the respondent in respect of his services, he has his own company and works for various entities.

On 10 August 2009 the claimant declined an offer from MD to undertake a week's work for the respondent. His refusal was based on the respondent's failure to pay monies due to him.

The claimant maintained that the respondent recruited QS to replace him, that work done by QS had already been attended to by himself and that he had worked from home (to avoid incurring expenses) in July finalising progress report no. 15. The respondent had not offered him any alternatives, such as short-time or part-time work, redeployment, or a reduction in his remuneration. The respondent's position was that it had wanted the files and information from the claimant as well as his physical presence in the office during his notice period.

The claimant was cleared by the Society of Chartered Surveyors of any wrongdoing in relation to the issues herein.

Determination

The claimant accepted that the respondent's business was in financial difficulties. However, he contended that the purported redundancy was a ruse to enable the respondent to replace him with a less costly quantity surveyor.

It is clear from the evidence that a stand-off situation developed between the parties as to on the one hand the handing over of files by the claimant and on the other the payment by the respondent of the claimant's expenses. As a result of this situation the respondent was unable to gain access to information on files which were in the sole possession of the claimant and which were vital to the respondent to validate and finalise cumulative valuations for submission to the client. Whatever the rights and wrongs of the situation that developed between the parties the Tribunal accepts the respondent's evidence (corroborated by QS) that he was retained by the respondent for around seven weeks in August and September 2009 to reconstitute the valuations for submission to the client for payment. The Tribunal is further satisfied that QS was retained on a consultancy basis, that he submitted invoices in respect of his services to the respondent and that he had not been an employee of the respondent.

The Tribunal, rejecting the claimant's above-mentioned contention, is satisfied that a genuine redundancy situation as defined in Section 7 (2) (c) & (e) of the Redundancy Payments Acts 1967 to 2007 existed in the respondent company in late summer 2009 and that the claimant's position was made redundant. Accordingly, the claim under the Unfair Dismissals Act, 1977 to 2007 fails.

The appeal under the working Time Act, 1997 is dismissed for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)

