

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**  
EMPLOYEE

*- claimant*

**CASE NO:**  
UD615/2010  
MN557/2010

against  
EMPLOYER  
under

*- respondent*

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary BL

Members: Mr. A. O'Mara  
Mr. O. Nulty

heard this appeal in Monaghan on 2 September 2011

### **Representation:**

Appellant: Wilkie & Flanagan, Solicitors, 8, The Hill, Monaghan, Co. Monaghan

Respondent: Mallon, Solicitors, Glencarn Centre, Castleblayney, Co. Monaghan

The decision of the Tribunal was as follows:

### **Claimant's Case:**

The claimant gave evidence. He commenced employment with the respondent as a truck driver in their quarry in 2007. He had previously approached one of the owners (JMQ) on numerous occasions seeking a job. JMQ hired him and told him he would be a driver.

As business started to decline the staff of four drivers and six other quarry staff were put on a week on week basis. In August 2009 he was moved to work on the stone crusher, which was a huge machine. He told the Tribunal that he had not been trained properly to use the machine.

On September 1<sup>st</sup> 2009 the machine got jammed with a huge boulder. He put his left hand into the machine, between the two jaws. Some smaller rocks slide down the side and jammed his hand. He got his injured hand out and signalled to his colleague (DC) working on the shovel digger to come to him. He asked him to get one of the guys(B) who preformed first aid. The co-owner (JMQ) came to him and he told him whathad happened to the crushing machine and that he had sustained an injury to his lefthand. JMQ told him it was only a knock and that he'd had worse himself. The claimant told him that he needed to go to his doctor or the hospital to

get it checked. JMQ told him he was no good to him, to clear off and he would get another man.

He told the Tribunal that his hand was very swollen and his veins appeared crushed. JMQ drove him up the quarry and he went to the office and told one of the office staff (PC) of how he sustained his hand injury. He signed out, not giving a reason why at that time of day, and left to drive to his doctor. He also attended the hospital. A week later he rang the other co-owner (MMQ) and told her what had happened and what her husband, JMQ, had said to him. She said she would discuss the matter with her husband and get back to her the following day but she did not.

He attended his solicitor for advice. His solicitor wrote two letters to the respondent dated September 10<sup>th</sup> 2009. The first letter stated that the claimant had informed him that he had been summarily dismissed on September 1<sup>st</sup> 2010 and if they did not compensate adequately for his dismissal he would take a claim for unfair dismissal and minimum notice. The second letter referred to the claimant's injury and the loss, damage, inconvenience and expense the accident had caused him. It also referred that if they did not admit liability with an undertaking to compensate the claimant within seven days they would have no alternative but to issue proceedings.

On September 14<sup>th</sup> 2009 MMQ replied to the claimant's solicitor stating the claimant had not been dismissed, that she had tried to contact him on a number of occasions, that he had been paid while on sick leave for the rest of the week and that he was still on the payroll and his job remained available. He received no further contact from the respondent company. On February 8<sup>th</sup> 2010 his solicitor again wrote to the respondent stating that as there had been no contact since the letter of September 14<sup>th</sup> 2009 there was no alternative but to commence proceedings for unfair dismissal.

When asked he said that he had not left of his own accord. On March 1<sup>st</sup> 2010 his solicitor again wrote to the respondent requesting what job was available to him on a full time basis, which had been indicated in a previous letter, and that his loss of wages since September 1<sup>st</sup> 2009 would be discharged. The claimant gave evidence of loss.

On cross-examination he stated that he had not wanted to return to work for the respondent because he did not think it would be safe. When asked again what JMQ had said to him on the day of the incident he added JMQ told him he was not "cut out for the quarry". He said he had seen the safety statement and had received "toolbox" talks on procedures but had not received any training on the stone-crushing machine. He had been shown how to switch it on and off. He said he had several missed calls from MMQ and another member of staff. He had since changed his mobile number. When asked why he had not returned the missed calls he replied that he had spoke to MMQ in September 2009 but she had not got back to him and he did not want to speak to them.

He told the Tribunal he had not supplied the respondent with the two medical certificates from his doctor and the local hospital. On the day in question PC had looked at his hand in the office but offered him no assistance. He did not know if she was trained in first aid. He texted one of the other staff in the office some time later

for his P45.

When asked by the Tribunal he said that he lived fifteen miles from the respondent's premises but had not called to the premises after the incident on September 1<sup>st</sup> 2009. After three to four weeks he was available to work again. He was very unhappy how JMQ had treated him and had been very happy working for the respondent. He hoped JMQ would have come to see how he was.

### **Respondent's Case:**

A former colleague (DC) of the claimant's gave evidence. He commenced employment with the respondent in September 2007. On the day in question the claimant had signalled for DC to come to him. DC went to him and was informed the machine had jammed and the claimant had sustained an injury to his hand. The witness said the machine had not jammed otherwise he would have had to stop working the shovel machine filling the stone crusher. The claimant asked for him to get JMQ. JMQ arrived and took the claimant away in his jeep to the office. He said that if the claimant had got caught in the machine he would have been dragged into it, it was so strong.

On cross-examination he stated that he had not stated that the claimant had not received an injury at work. There had been no talking between JMQ and the claimant before they got into the jeep on the day in question. When asked he said the when the claimant had spoken to him of the incident he had held out his hand but there had been no blood on it.

The staff member in the office (PC) on the day in question gave evidence. She had been dealing with invoice on her computer when she heard voices outside. She turned around and the claimant was in the office who asked for the signing in / out book. He told her he had sustained an injury to his hand. It was red and slightly swollen with a purple dot on it; he did not seem in shock. She had been trained in first aid and asked if he could clench his fist and asked could he drive. He replied yes. He never said JMQ had dismissed him.

She contacted MMQ and told her what happened. MMQ came to the office and she again explained what had occurred. The following day she tried to contact him and left a text message. She later spoke to him and asked how he was. He said he was ok and had to return for a check up on Friday. She again spoke to him the following Friday to discuss the delivery of his wages. He never told her he was dismissed.

On cross-examination she could not recall the claimant telling her JMQ had told him to clear off. When asked she said the company safety statement was beside her desk in the office. There were also other health and safety posters pinned up. She had offered to get someone to drive the claimant to either his doctor or hospital.

When asked by the Tribunal she said she had not filled out an accident report book on the day in question or any day, this was not in her remit.

One of the directors / co-owners (MMQ) gave evidence. On the day in question PC had contacted her and informed her of the incident. She went to the office and was

again told by PC what had occurred. She asked had anyone driven him to the hospital but was told he drove himself. She tried to contact the claimant on his mobile phone a number of times but to no avail. She spoke to her husband (JMQ) about the incident but he never mentioned he had dismissed the claimant.

The following day PC informed her she had spoken to the claimant. He was okay but had to go for a check up the following Friday. Some time later he texted one of the office staff for his P45 and she advised her to send it to him.

She told the Tribunal that during the month of September 2009 she had rang the claimant on fifteen occasions. PC never mentioned to the witness that the claimant had said he had been dismissed. The first contact she had from the claimant was a phone call to her home in February 2010. She asked how he was and if he was returning to work. He replied he was no sure and she informed him his job was still there for him.

The first she was made aware the claimant felt he had been dismissed was in his solicitor's letter dated September 10<sup>th</sup> 2009, she was shocked. She rang the solicitor in question and called into the office but he was not present. She was advised to write to the solicitor. The claimant still remained on the payroll. He never contacted her until February 2010. She agreed the quarry could be a dangerous place to work in.

On cross-examination she stated she had not contacted the claimant's doctor or the hospital for medical certificates for the claimant as that was confidential and she would be refused. She had left a message on his phone to submit them but was unsure of the date. She explained to the Tribunal that a member of staff (C) looked after the training of staff. They were advised not to use their hands to clear out a jammed machine and that it was a two-man task. She was not present when JMQ had spoken to the claimant on the day in question. She did have the claimant's home address on file and one of the other drivers lived near him. When asked how many times she had tried to contact the claimant between September 1<sup>st</sup> and September 11<sup>th</sup> 2009 she replied five. She never asked the driver who lived near the claimant to call in to see how he was, neither did she and felt after her missed calls the claimant did not want to speak to her. She did not accept the claimant told her on the telephone that JMQ had told him to "clear off" on the day in question. JMQ had not told her either.

When asked she said she was not sure why the claimant had contacted her in February 2010. They never dismissed the claimant. When asked by the Tribunal when she had received a response to her letter of September 14<sup>th</sup> 2009 she replied February 8<sup>th</sup> 2010.

When put to her that in the company's terms and conditions the disciplinary and grievance procedure it did not mention a grievance procedure she agreed. She agreed that when he had attended the hospital for his injury she agreed he would have had to switch off his mobile phone. The company had had minor accidents in the past and no one had been dismissed over them.

The other director / co-owner (JMQ) gave evidence. On the day in question DC had informed him the claimant had injured his hand. The claimant showed it to him and he told the Tribunal that it looked like it could have been from "a hurley". The

claimant told him he wanted to get it seen to. The claimant walked towards the office, the witness turned off the machine, which was clear, and asked him to get into the jeep. He drove him to the office and called to PC the claimant was going to his doctor. He had not dismissed the claimant.

On cross-examination he stated he thought the claimant had sustained a minor injury. He found the stone crushing machine not to be jammed when he switched it off. There was no more work carried out on that machine until after lunch but stated lunch hour was ten minutes after the claimant signed out. He had not offered to drive him to the doctor / hospital. He stated the solicitor's letters the company received were a complete shock. He stated that when he had employed the claimant he had told him staff worked in all parts of the quarry. No one was guaranteed to work in one part (for example driving) only. He never dismissed the claimant and his job was still open to him. The claimant was not replaced.

**Determination:**

The Tribunal have carefully considered all the sworn evidence given by both parties to this claim and find there was some conflicting evidence to what had been said between the claimant and JMQ on the day in question. Correspondence had crossed over between the claimant's solicitor and the respondent company and they had stated he had not been dismissed and his position was still there for him.

Having considered the matter the Tribunal find the claimant had not been unfairly dismissed. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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