

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:  
EMPLOYEE            -*Claimant*

CASE NO.  
UD2087/2009  
MN1948/2009

Against  
EMPLOYER -*Respondent*

under

**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: Ms. D. Donovan B.L.  
Members: Mr. J. Hennessy  
              Mr. F. Dorgan

heard this claim at Waterford on 9th February 2011 and 24th August 2011

**Representation:**

Claimant: Mr. James Burke B.L. instructed by David Burke & Co, Solicitors,  
24 Mary Street, Dungarvan, Co Waterford

Respondent: Mr. Conor O'Connell, Construction Industry Federation,  
Construction House, 4 Eastgate Avenue, Little Island, Cork

Respondent's evidence:

It was the evidence of the Centre Manager that, on the 5<sup>th</sup> June 2009, he had instructed the claimant to spray weeds with a weed killer but that the claimant had refused three times to do this. The Centre Manager then sent the claimant home and told him to come back on the following Monday and that he was going to report the matter to the Chief Executive Officer. He was adamant that he had not suspended the claimant. On the following Monday the claimant did not turn up for work and the Centre Manager rang him three times but got no answer. He then rang the Chief Executive Officer and the CEO told him that he would ring the claimant. The claimant turned up the next day for work and Centre Manager put him on light duties. The CEO was to meet with the claimant later that day and the Centre Manager had no further dealings with the claimant after that.

The Centre Manager said that he himself was suspended on 9<sup>th</sup> June 2009 as a result of the accusation that he had bullied the claimant. However he was re-instated the following day.

The following accusations were put to this witness and he denied all of them.

- That he was mixing the weed killer in an area in or close to the staff canteen.
- That the claimant had told him on a previous occasion that the weed killer had made him feel nauseous.
- That another staff member had reported, to him, getting headaches from using the same weed killer.
- That he had failed to issue the claimant with protective clothing and equipment required for the task of spraying the weed killer.
- That he had personally delivered the dismissal notice to the claimant and handed it to him at the claimant's apartment.

The evidence of the Chief Executive Officer (CEO) was as follows. The Centre Manager had reported an incident, which occurred on 5<sup>th</sup> June 2009 whereby the claimant refused to carry out a reasonable instruction. The CEO arranged to meet with the claimant on the 9<sup>th</sup> June 2009 and had brought with him a written warning, which he intended to issue to the claimant. However in the course of this meeting the claimant made an accusation of bullying against the Centre Manager.

The CEO suspended the claimant and the Centre Manager and interviewed three other employees in relation to this allegation against the Centre Manager. The CEO re-instated the Centre Manager the following day, having satisfied himself that the allegation of bullying was unfounded. It was put to the witness that one of the employees he stated to have interviewed would later give evidence that he was never interviewed in relation to this matter. The CEO reiterated that he had interviewed that employee.

A meeting was held on 18<sup>th</sup> June 2009 between the CEO and a Director of the respondent on the one side and the claimant on the other. The claimant was offered the opportunity to bring someone with him but declined that offer. At this meeting the claimant was asked if he would take instruction from the Centre Manager in future and he replied that he would not. Therefore the CEO felt that he had no alternative but to dismiss the claimant and accordingly issued a letter of dismissal to him on 22<sup>nd</sup> June 2009.

#### Claimant's Evidence:

It was the claimant's evidence that his employment with the respondent commenced during November 2006. The claimant stated that he did not receive a contract of employment but he recollected completing a medical questionnaire some two years into his employment. He does not have a medical condition now nor did he have a medical condition at the time of completing the questionnaire.

Sometime prior to June 2009, the claimant was asked to spray weeds around the shopping centre and he performed this task for around 20 minutes. He began to feel nauseous, developed a headache and started to sweat. The claimant said that he had not received instructions on how to spray. He went to the then Centre Manager and told him that he thought his symptoms were due to the spray that he was using in the course of his duties. The manager was apologetic and told the claimant to take the rest of the day off and to attend a doctor. It was late in the day so the claimant did not go to the doctor and by the next day he felt better. The Centre Manager told the claimant not to use the chemicals if they made him sick. The Assistant Manager was also aware of the situation at the time. In 2008, the Assistant Manager took up the position of Centre Manager.

The claimant confirmed that an appraisal of his work performance was carried out in March 2009. The claimant recalled that there was some bickering over his rate of pay as he had been told at the commencement of his employment that he would be paid a carpenter's rate but this did not materialise. In any event, there were no issues raised regarding the claimant's performance during the review.

In early June 2009, the claimant was sent to meet a person in Clonmel in order to collect herbicide for the respondent company. The person told the claimant that the herbicide was an industrial herbicide of high strength and concentrate. The claimant informed the Centre Manager of this. On Wednesday, 3<sup>rd</sup> June 2009 the Centre Manager enquired from the claimant as to what had happened the last time he had sprayed herbicide. The claimant described to him what had happened.

On Friday, 5<sup>th</sup> June 2009 the Centre Manager asked the claimant to meet him in the workshop. When the claimant arrived there the Centre Manager was putting herbicide into the sprayer. The workshop was also used as a canteen. Details of the herbicide were opened to the Tribunal. The Centre Manager continued to mix without measuring quantities. The Centre Manager told the claimant that he would be spraying weeds around the shopping centre. The claimant reminded the Centre Manager that he was aware that it had made the claimant ill and that he would not use the herbicide. The respondent company did not provide health and safety clothing nor had a risk assessment been completed. The Centre Manager told the claimant that he would do as he was told. The claimant repeated that he would not use the spray without proper safety gear. The Centre Manager then told the claimant to go home. As the claimant walked out of the workshop the Centre Manager said that he was suspended with pay until further notice and asked him to return his keys, which was not normal practice.

The claimant waited by the telephone the following Monday but he was not contacted by the Centre Manager. The Chief Executive Officer of the respondent company telephoned him in the afternoon. The claimant considered this odd, as the Chief Executive Officer would only be in the shopping centre two or three times per month. The Chief Executive Officer enquired why the claimant was not in work and the claimant informed him that he had been suspended. The Chief Executive Officer said he was not suspended but the claimant reiterated that it was his clear understanding that the Centre Manager had placed him on suspension. The claimant noted to the Tribunal that he had never missed a day of work during his employment with the company. The telephone call terminated after the Chief Executive Officer had told the claimant to come back to work and just forget about the suspension.

The claimant attended for work the next day but there was a change in his working conditions as the Centre Manager telephoned him every thirty minutes enquiring as to the claimant's whereabouts and asking what duties the claimant was carrying out.

On Thursday, 11<sup>th</sup> June 2009 the claimant was asked by the Centre Manager to attend the office. At the office both the Centre Manager and the Chief Executive Officer were present. The Chief Executive Officer told the claimant that they were going to talk to him about the incident. The Centre Manager categorically denied at the meeting that he had suspended the claimant. The claimant told them that he was not going to be bullied into damaging his health or his safety. When the claimant said this he was not accusing anyone of bullying him. After the claimant made the statement, the Chief Executive Officer suspended him and handed him a letter. The letter had been prepared prior to the meeting and was confirmation that a verbal warning was being given to the claimant for failure to carry out one of his duties.

Sometime after this meeting the Chief Executive Officer telephoned the claimant and arranged to meet him on 18<sup>th</sup> June 2009. The claimant told the Chief Executive Officer that he was anxious to talk and resolve matters. The claimant presented a written document outlining his side of the matter and this was read at the meeting. However, then the claimant was accused of lying about a medical condition and the claimant replied that he did not have a medical condition. The claimant was asked to attend a doctor and get details of all the chemicals he was allergic to. The claimant agreed to the company's request for him to attend a doctor. He was asked if he had a difficulty taking instructions from the Centre Manager and would he refuse to take instructions in the future. The claimant replied that he would refuse if it were something damaging to his health or safety.

The claimant made an appointment with a doctor but before he could attend for this appointment he received a letter of dismissal from the company. The letter of dismissal was hand delivered to the claimant by the Centre Manager on 23<sup>rd</sup> June 2009.

The claimant gave evidence of loss.

During cross-examination the claimant confirmed that he had applied for a maintenance position with the company and he confirmed that he had signed the medical questionnaire, which described his position as that of handyman/gardener, but he stated that his duties did not involve much gardening.

It was put to the claimant that when he was asked to spray he had objected not on safety grounds but that he had simply not wanted to carry out the work. He was told that the company displayed signage on the premises concerning the personal protection equipment available to employees. The claimant replied that signage was not displayed on the walls during his employment and the only equipment available to him was protective glasses. A list of the claimant's duties was opened to the Tribunal and one of the duties listed was to "kill weeds at multi storey", the claimant said that he did this by pulling weeds by hand.

A general inspector with the Health and Safety Authority gave evidence to the Tribunal that a specific department of the Authority deals with chemicology and toxicology. The HSA is responsible for implementing health and safety and also to react to complaints received. On the 15<sup>th</sup> June a complaint was referred to the witness that an employee of the respondent company was being forced to use herbicide without personal protection equipment. As a result of the complaint the inspector attended the respondent's premises to complete an inspection.

On 23<sup>rd</sup> June 2009 he visited the respondent's premises and met with the Centre Manager and carried out an inspection with the complaint in mind. He viewed the respondent's health and safety policies and safety statements. Personal protection equipment was mentioned in the safety statement amongst other matters. He did a walk around and noted any issues that needed to be addressed such as a declaration of site sign that was unsigned, the personal protection register was unsigned as well as some other matters. The inspector issued an improvement notice to the respondent company regarding these matters and he subsequently sent them a report of the inspection outlining that the company needed to revise its health and safety statement and take into account the risk assessment items that the inspector had listed. He also outlined that the company needed to have accident reporting structures in place, the safety statement and personal protection equipment register needed to be signed by the managers and employees. The respondent company subsequently corrected these issues. The inspector said that while the respondent company had a safety statement, the safety statement did not include spraying

and other issues.

The inspector did not have a note of whether or not the respondent had a licence for the herbicide product, if that was required. The inspector was unable to say if there was personal protection equipment actually available to the employees.

In reply to questions from the Tribunal, the inspector was asked if he observed anywhere that chemicals were stored beside an area where food was consumed. The inspector said if he had seen that then he would probably have made a note of it. He observed a sink in the workshop area but he formed the opinion that this was for staff to wash their hands. He could not say if he had seen protective clothing during his inspection of the premises.

A member of the security personnel in the shopping centre gave evidence that the respondent employed him until the 11<sup>th</sup> June 2010. He stated that the Chief Executive Officer did not meet with him as part of an investigation into a bullying complaint concerning the claimant as had been indicated by minutes.

He recalled the time in June 2006 when the claimant had left work with a headache from spraying. He confirmed that staff are allowed to eat in the workshop.

Employee P gave evidence that he worked for the respondent until March 2010. He did gardening work, disposed of rubbish and carried out spraying duties. He was not provided with personal protection equipment for carrying out the spraying duties. He stated that there was a sink, kettle and microwave in the workshop for staff to use. He recalled the Centre Manager telling him that he had suspended the claimant.

**Determination:**

The Tribunal notes the conflict in the evidence adduced at the hearing. Having carefully considered the evidence the Tribunal prefers the evidence of the claimant that he was suspended on Friday, 5<sup>th</sup> June 2009. The claimant's evidence is supported by the fact that he had to return his keys and by the fact that he did not report for work on the following Monday. The Tribunal finds that the reason for the claimant's dismissal by the respondent was wholly or mainly for his refusal to sprayweed killer without protective equipment. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal awards the claimant an amount of €43,555.20.

As the claimant's representative confirmed that the claimant had received his entitlements under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the claim under these Acts, is dismissed.

Sealed with the Seal of the Employment Appeals Tribunal

This \_\_\_\_\_

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

(CHAIRMAN)