

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE -*Claimant*

CASE NO.
UD988/2010
MN961/2010

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
Ms S. Kelly

heard this claim at Kilkenny on 22nd November 2011

Representation:

Claimant: Mr Martin O'Carroll, Poe Kiely Hogan Lanigan, Solicitors,
21 Patrick Street, Kilkenny

Respondent: A director of the company

The determination of the Tribunal was as follows:

Dismissal as a fact was in dispute in this case. The claimant was employed as a machine driver with the respondent which is a small company. It was the claimant's evidence that the employment was uneventful until an incident occurred on Monday, 25th January 2010.

The claimant was using a mini digger to make a trench on that date. The trench was already opened but was not fenced off by the company as it should have been. The claimant found himself in a situation where children came around his machine with the result that a child's toe was caught with the side of the claimant's machine. The claimant reported the incident to a director of the company.

It was the claimant's evidence that the following day the director told him that he was no longer to use any machinery or tools on site. The claimant's union representative told the claimant to stay on site until he was sent home by the director and so the claimant remained on site watching his colleague carry out his duties. On Friday, 29th January 2010 the claimant received his

normal week's wages. On that day the director told him that he would have to complete a safe pass course. The claimant should have had a valid safe pass but it had elapsed sometime in 2008. Therefore he did not have a valid safe pass at the time of the incident.

The following week the claimant attended and completed a safe pass course. He telephoned the director to inform him of this. The director told him that was no longer the issue. He wanted the claimant to take full responsibility for the incident and perform a specific duty. The director told the claimant that unless both of these things happened he could not return to his position. The claimant had no further contact from the director.

A director of the company gave evidence that the claimant was booked to attend a safe pass course on the 19th September 2009, as under the Health, Safety and Welfare at Work Acts, the respondent company is bound to ensure that employees have the necessary training. The claimant failed to attend the course. The claimant refuted this stating that he had never failed to attend for any course that had been arranged.

The director acknowledged that the claimant continued to work for the company without having a valid safe pass but he stated that he also had a responsibility to provide the claimant with work. The director was unsure as to whether or not the insurance company would cover the incident of the 25th January 2010, as the claimant did not have a valid safe pass. The insurance company requested a statement of the incident and this was what he had asked the claimant to provide to the insurance company. That was the extent of their discussion on the matter. He did not dismiss the claimant as he had work for him. The claimant's machine was idle the following week until another driver was employed. He did not issue a P45 to the claimant as he did not consider the employment to be at an end. It had previously happened that the claimant had been absent for a number of weeks but later returned to work. On such occasions the director had not attempted to contact him then either. The claimant in evidence accepted that he had travelled abroad for four weeks during 2007 but he refuted that he had been absent in the weeks leading up to the incident on the 25th January 2010.

Determination:

Having carefully considered the evidence adduced at the hearing the Tribunal finds there is a conflict of evidence between the claimant and the respondent as to whether the claimant was dismissed or not. The Tribunal finds that the claimant had an entitlement to return to work as soon as he obtained his safe pass certificate. The Tribunal finds that the claimant was not allowed to return to work having obtained his safe pass certificate, rather the respondent made the claimant's return to work contingent on matters other than his having a valid safe pass certificate. In the circumstances, the Tribunal finds that there was a dismissal and that in the circumstances the said dismissal was unfair. The Tribunal further finds that even if there had not been an actual dismissal the actions of the respondent were such as entitled the claimant to consider himself constructively dismissed. The claim under the Unfair Dismissals acts, 1977 to 2007, succeeds. The claimant did not demonstrate any effort or any adequate efforts to mitigate his losses. The Tribunal finds the appropriate sum of compensation to be €4,500.

The Tribunal finds that claimant was paid for two weeks that he did not work and the Tribunal deems this to be pay in lieu of notice. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)