

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:  
EMPLOYEE

CASE NO.  
UD1711/2010, RP2304/2010  
MN1661/2010, WT763/2010

against

EMPLOYER  
under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. O'Connor  
Members: Ms M. Sweeney  
Mr D. McEvoy

heard this claim at Tralee on 7th March 2012

**Representation:**

Claimant : Ms Nuala Liston, Liston & Company, Solicitors,  
8 Day Place, Tralee, Co Kerry

Respondent :

The determination of the Tribunal was as follows:

**Claimant's Case**

Prior to commencing employment with the respondent in September 2006 the claimant worked for another company directly linked to the respondent. He maintained that no break occurred between these two employers and that his terms and conditions of employment were not altered at this changeover. During the course of his employment as a general worker with the respondent he always reported to sites and never refused work from the company. Apart from being an employee the claimant also leased a digger to the respondent.

Following completion of work on a site in county Tipperary on 10 February 2010 the claimant received a call from a manager the next day asking him to attend a course in manual handling for that coming Saturday 13 February. The claimant made it known to that manager that he would not be in a fit state to attend that course as he was scheduled to be at a wedding the previous day. It was never stated by the respondent in any form that attending that course was compulsory and failure to do so would lead to a withdrawal of work to him until he gained the certificate in that course. When he indicated his proposed non-attendance no alternative date was offered to him then or subsequently. He told the Tribunal that he had no difficulty or objection to attending that or any other course if asked to do so.

During that time it was the claimant's impression that the main proprietor of the business "had turned his back" on him. An issue had arisen over the lease and payment of his digger to the respondent which was ongoing. By February 2010 that proprietor had been ignoring him and subsequent to 11 February there had been no meaningful communication from the company to him about work or courses. His attempts to phone the respondent elicited no response and a letter he wrote to the proprietor on 1 July 2010 enquiring about his status with the respondent was not answered.

### **Respondent's Case**

The spouse of the main proprietor told the Tribunal that a client company informed the respondent in January 2010 that all their employees must have a valid manual handling training certificate. At that time the claimant's certificate was out of date and that he had to be accompanied on sites by someone who had such a certificate. She accepted that the claimant had stated that he would be unable to attend the relevant course on 13 February 2010 and that no further courses were arranged for him.

It was her belief that the company had ample work for their employees including the claimant throughout that year. The efforts made to contact the claimant regarding that work were in vain as he never returned calls. It was not the respondent's practice to communicate in writing to its staff. The company was forced to hire another employee in lieu of the claimant as he had not made contact with the respondent about work. A document addressed to the department of Social Protection dated 9 April 2010 and signed by the witness on behalf of the respondent was submitted to the Tribunal. That document stated that the claimant's employment ended as he had not complied with instructions to complete a training course. A reference was also made to a digger dumper. The efforts made to contact the claimant regarding that work were in vain as he never returned calls. It was not the respondent's practice to communicate in writing to its staff. The company was forced to hire another employee in lieu of the claimant as he had not made contact with the respondent about work.

### **Determination**

It is far better to over communicate than to under communicate if one wants their messages to be conveyed and received. Both parties in this case certainly adopted the latter approach which of course had its consequential adverse effects. While the respondent's evidence lacked substance mainly due to the non-attendance of its relevant witnesses it is clear and the Tribunal accepts that this was not a redundancy issue.

It is equally clear that the claimant did not voluntarily resign his position from the company. This leads the Tribunal to find that a direct dismissal took place and that this dismissal was unfair under the Unfair Dismissals Acts, 1977 to 2007. However, the claimant was both a victim and a contributor to his own dismissal. In awarding the claimant €5000.00 under those Acts the Tribunal was not impressed with his efforts to mitigate his loss.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also allowed and the Tribunal awards the appellant €1916.00 as compensation under those Acts.

The appeal under the Redundancy Payments Acts, 1967 to 2007 must be dismissed as the appellant was not made redundant.

The appeal under the Organisation of Working Time Act, 1997 falls for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

