EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
	UD622/2011
	RP857/2011
	MN667/2011

EMPLOYEE

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy SC

Members: Mr. C. McHugh
Mr. J. Dorney

heard this case in Dublin on 31 July 2012

Representation:
_____

Claimant(s):
Mr. Diarmuid Murphy BL instructed by
Maguire McClafferty, Solicitors,
8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent(s):
Ms. Lisa Maher BL instructed by
Eirinn McKiernan & Co., Solicitors,
11 Ashe Street, Cavan, Co. Cavan

The determination of the Tribunal was as follows:-

Claims were brought under unfair dismissals and minimum notice legislation. Also an appeal was brought under redundancy legislation. It was alleged that the claimant employee, a general operative, had worked for the respondent for over three years (commencing on 25 October 2007) only to be dismissed on 29 October 2010 without redundancy payment or reason for his dismissal.

In its defence the respondent (a company that provided services by erecting barriers and closing lanes for the M50 and other roads) stated that the claimant had not been made redundant but had been dismissed under disciplinary procedures for refusing to work and act "in a safe manner to his fellow workers. The respondent's legal representatives stated that the claimant had been dismissed for gross misconduct.

At the beginning of the Tribunal hearing the Tribunal was told that the appeal lodged under the Redundancy Payments Acts, 1967 to 2007, was withdrawn.

The respondent's representative stated that the claimant had not cleaned a paint-lining machine thereby costing the respondent money. Also, the claimant, a night-shift worker, objected to working longer than ten hours and asked for a move to a day shift (which might involve a move to the respondent's yard). On 29 October 2010 the claimant had told Ms. DRK (a HR manager with the respondent) that he had an issue with working more than ten hours but Mr. SM (operations manager of the respondent) had said that there was no-one available to cover for the claimant. The claimant said that he would leave with one of the respondent's two vehicles if he had to work more than ten hours. The claimant, who made no allowance for colleagues who would be left on the M50 motorway, was dismissed on 29 October 2010. SM and DRK had been key to the claimant's dismissal but were not present at the Tribunal hearing. Mr. TD (co-founder and director of the respondent) was in attendance at the Tribunal hearing but could not recall if DRK had referred to him before the claimant's dismissal.

The claimant's representative stated that a 17 February 2009 verbal warning issued to the claimant had no effect after six months (according to the respondent's own handbook) and, citing a verbal warning dated 24 October 2009 and a letter dated 28 October 2009, denied that the claimant had been working with a paint-lining-machine. It was alleged that the claimant had been summarily dismissed without procedures and that the respondent had tried to mend its hand by following its first defence with a second one. The absence of DRK and SM from the Tribunal hearing was lamented especially as a typed note of a 29 October 2009 meeting between them and the claimant made no reference to any call being made to TD.

Shifts could be up to fifteen hours long. Forty hours was a basic week. Any more was overtime.

It was alleged that the claimant had not been guilty of gross misconduct or of anything close to it but that on 21 September 2010 the claimant had sustained injury when he had been hit in the face by a road-sign whereupon the respondent's attitude had changed. 28 October 2010 was the day on which a personal injury claim had been sent.

It was contended that, prior to his dismissal, the claimant had already told the respondent that he would make a claim against it. The claimant's wife was heavily pregnant and ill. The claimant had done a shift and had been told to go back to do a fifteen-hour shift. He did not see the final meeting (with DRK and SM) as a meeting which could lead to his dismissal and went

to the meeting to discuss swapping out of the shift. He was told to do the shift or be fired.

A PIAB (Personal Injuries Assessment Board) letter was shown to the Tribunal.

The respondent's representative countered that the respondent had got the PIAB letter post-dismissal and that the claimant had rung to say that he would not be going to work. Asked how she could make the respondent's case (to justify the claimant's dismissal) without DRK, the respondent's representative replied that she could not proffer direct evidence but that TD would give hearsay evidence e.g. regarding work practices.

The claimant's representative stated that, at the material time, the claimant would have had only six to seven hours between shifts.

The respondent's representative said that the final decision on the claimant was to be made at the final meeting. While DRK might have had certain instructions as regards her options after meeting the claimant it was conceded that TD could only give hearsay evidence. While subpoenas could have been sought for DRK and SM there was no suggestion that this had been done.

Giving sworn testimony, TD confirmed that he was a co-owner and director of the respondent which provided a safe place for others to do work on high-speed routes. At the material time the respondent had a workforce of about ninety and was working on an upgrade of the M50 motorway. The respondent worked from 22.00 to 06.00. There was a fine of €17.5k for any time the respondent worked on the M50 outside these times. The job involved walking out in front of live traffic.

The claimant worked on lining in a team of six to eight employees. The claimant was a fine worker and the claimant's wife had also worked for the respondent but TD said that DRK had told him that the claimant had not worked unusual hours but the claimant had got very agitated, had requested a return to a ten-hour shift and (rather than continuing to work) was going to take away a vehicle such that he would leave his colleagues on the M50.

TD told the Tribunal that he had had no dayshift for the claimant. Neither could he put the claimant in the respondent's yard. It cost money to retrain someone.

Regarding the claimant, TD said that it was not true that he had sacked him for making a claim. TD said that this was an insurance company matter and that this was why he paid the premium. TD also said that he had no problem giving redundancy money if someone was entitled to it.

TD apologised for not cancelling SM's holidays so that SM could attend the Tribunal hearing.

Giving sworn testimony through an interpreter, the claimant indicated that his heavily pregnant wife had assisted him in his communication with the respondent. (The claimant's wife was not in attendance to give evidence at the Tribunal hearing.)

When it was put to the claimant that it was alleged that he had said that he would leave work early he stated to the Tribunal that he had asked for a swap after ten hours and that he would have swapped if someone was willing to swap. He would then take away a tipper and someone else would bring another tipper.

Determination:

At the beginning of the Tribunal hearing the Tribunal was told that the appeal lodged under the Redundancy Payments Acts, 1967 to 2007, was withdrawn.

Regarding the unfair dismissal claim, a dismissal is unfair unless the dismissing employer shows substantial grounds to justify it. The Tribunal did not hear from the respondent's HR manager or operations manager. The respondent's principal did attend the Tribunal hearing but was remote from it. The Tribunal had to find that the respondent had not discharged the onus of proof although it did not find the claimant's memory (and, therefore, his evidence) very reliable. The Tribunal did believe that the respondent's principal thought that the claimant would take the tipper truck.

However, the Tribunal found that, at most, there was a dispute about working hours but that there was nothing that could be called gross misconduct. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, succeeds and the Tribunal awards the claimant the sum of €1,124.50 (this amount being equivalent to two weeks' gross pay at €562.25 per week) under the said legislation.

The claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and, in all the circumstances of the case, the Tribunal found compensation to be the appropriate redress to award.

In assessing compensation the Tribunal had regard to a number of factors:

The claimant is being separately compensated for the first two weeks under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The major contract on which the claimant worked would have ended about three months later. At that point he would have been entitled to a redundancy payment.

The claimant returned to Poland where he found work at a much lower nominal pay but where

the cost of living would also be lower.

Having regard to these factors, the Tribunal awards compensation under the Unfair Dismissals Acts, 1977 to 2007, in the sum of €11,000.00 (eleven thousand euro) as being just and equitable having regard to all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)