

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD447/2011

RP588/2011

MN458/2011

WT157/2011

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 T. Ryan

Members: Mr W. Power
Mr S. O'Donnell

heard this claim at Dublin on 12th July 2012

Representation:

Claimant: Mr John Nolan, John Nolan & Company, Solicitors, 11
Parliament Street, Dublin 2

Respondent: Mr. Tim O'Connell, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

Preliminary issue:

At the outset the Tribunal was asked to consider a preliminary point in relation to Section 8 (10) (b) of the Unfair Dismissals Act, 1977 ("the 1977 Act"), as amended by Section 7 (d) of the Unfair Dismissals Amendment Act, 1993 ("the 1993 Act"), namely that it does not have jurisdiction to hear the claim because the claimant had already made a complaint under the Industrial Relations Acts, 1969-2004, to the Rights Commissioner Service.

Background:

The claimant was involved in an incident on the 23rd April 2010 on a site in Dublin as a result of which he was suspended with pay pending an investigation. Following the investigation the

respondent transferred the claimant to a site in Kildare. The claimant was not satisfied with this decision and made a complaint under the Industrial Relations Acts, 1969-2004. This complaint was lodged with the Rights Commissioner service on the 20th July 2010.

The Tribunal notes that the Rights Commissioner in the "Background" of his Recommendation states that:

"The claimants are seeking a remedy under the Industrial Relations Acts, 1969- 2001, claiming that they were unfairly removed from their place of work in Castlegrange following a complaint by a member of staff following a minor injury which she sustained in the course of carrying out her duties". The Rights Commissioner goes on to clarify that two of the claimants resolved their complaints with the respondent leaving only the claimant's complaint unresolved. It is clear from the Rights Commissioner Recommendation that he did not consider the question of 'dismissal'. The Rights Commissioner could not have considered dismissal as no dismissal had taken place.

The respondent referred the Tribunal to the concluding paragraph of the SIPTU submission to the Rights Commissioner which states that:

"By rostering our members at locations in Kildare, our members believe that they are effectively constructively dismissed as they will not be in a position to reach locations due to transport difficulties and, in the case of our member with transport, an unacceptable cost burden in travel expenses."

The Tribunal had to consider the reference to the claimant being "effectively constructively dismissed" and whether this precludes the claimant from bringing a claim under Section 8 (10) (b) of the 1977 Act.

The Tribunal notes that Rights Commissioner hearing was held on the 23rd July 2010 and a Recommendation issued on the 30th November 2010.

The Law

Section 8 (10) (b) of the 1977 Act, as amended by Section 7 (d) of the 1993 Act provides:

"Where, in relation to a dismissal, a Recommendation by a Rights Commissioner has been made by a Rights Commissioner, or a hearing by the Labour Court under the said Acts has been commenced, the employee concerned shall not be entitled to redress under this Act in respect of the dismissal".

Applying the law to the facts and examining this section in detail, the Tribunal considered the following:

1. "Where in relation to a dismissal"

The Rights Commissioner did not investigate "a dismissal" and the only reference to a dismissal in the Recommendation is when the Rights Commissioner refers to it when summarising the respondent's case and then only refers to [a] "dismissal having been contemplated" and the "serious dereliction of duty and [b] the attempt to cover up occurred which would justify dismissal".

The Rights Commissioner did not consider a dismissal; it considered a dispute.

2. "a Recommendation by a Rights Commissioner has been made by a Rights Commissioner."

Even if the Tribunal were satisfied that the Rights Commissioner considered "a dismissal" in the context of the claimant's complaint, and, for the avoidance of doubt, the Tribunal is not so satisfied, the Tribunal is satisfied that it does not preclude the claimant from bringing a claim under the 1977 Act, as amended, for the following reasons:

- The Rights Commissioner hearing was held on the 23rd July 2010.
- The claimant submitted a claim to the Tribunal on the 24th November 2011.
- The Rights Commissioner Recommendation under the Industrial Relations Acts issued on the 30th November 2010.

The claimant submitted his claim under the 1977 Act (on the 24th November 2011) before the recommendation had issued from the Rights Commissioner (on the 30th November 2010) and is therefore not prohibited from bringing a claim under 8 (10) (b) of the 1997 Act.

3. "a hearing by the Labour Court under the said Acts has been commenced"

In the case before the Tribunal no Labour Court hearing had commenced.

For the reasons stated, the Tribunal is satisfied that it has jurisdiction to hear the claim and is not precluded by Section 8 (10) (b) of the 1977 Act, as amended, from so doing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

