

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE

CASE NO.  
UD864/2011  
RP1200/2011  
MN984/2011

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. L. Tobin  
Ms H. Kelleher

heard this case in Cork on 27 September 2012

Representation:

\_\_\_\_\_

Claimant(s):

Mr. David Waters, Sullivan Waters & Co, Solicitors,  
19 West End, Mallow, Co. Cork

Respondent(s):

No legal representation

The determination of the Tribunal was as follows:-

### Summary of Evidence

The claimant was one of three lorry drivers employed by the respondent. He worked for the respondent for some five years as a truck driver until 28 January 2009 when his position was declared redundant and he received a lump sum payment under the Redundancy Payments Acts. Some two weeks later in February 2009 the respondent recalled the claimant to the employment.

The respondent's position was that, on 3 December 2010, its three truck drivers were

given notice of being put on lay-off from 17 December 2010. The claimant's position was that he had not received notice but that on 20 December 2010 when he arrived for work the managing director's son (DS) spoke to him on the phone telling him that he had no more work before Christmas and to go home. The claimant interpreted this to mean that he had been dismissed. On 21 December 2010 the claimant saw a co-worker, who had commenced employment with the respondent in July 2010, long after the claimant had been re-hired in 2010, driving the truck he had frequently driven. On 3 January 2011 DS sent the claimant a text telling him that once they received orders he would phone him straight-away. There was no contact over the following few months. The respondent's evidence was that the employee seen driving the respondent's lorry on 21 December was employed on a casual basis to do repairs and in exceptional circumstances he would be asked to drive. In cross-examination the claimant accepted that he 'used to ask' DS about his job and DS reassured him that he would try to keep him on as long as he could.

The respondent's position was that when work eventually became available the following April DS had phoned the claimant on a number of occasions to offer him work but the claimant did not answer his calls and the respondent was not surprised because he was aware that the claimant had other work. The claimant denied getting any calls from the respondent in April or any other time. The respondent's position was that when the claimant did not answer its phone calls, it called in one/two of the drivers who had been put on lay-off in December 2010.

#### **Determination:**

Through some misadventure the claimant did not receive the respondent's letter of 3 December notifying him that he was to be put on lay-off from 17 December 2010. In light of his previous dismissal by reason of redundancy in late January 2009 it was reasonable for the claimant to interpret DS's words to him in the phone call on 20 December 2010 as a dismissal. However, the Tribunal finds that the claimant must have known from the words used by DS that his dismissal in December 2010 was by reason of shortage of work. The Tribunal's finding on the latter point is supported by the claimant's admission in cross-examination that on a number of occasions prior to 20 December 2010 he 'used to seek' assurances from DS as to the continuation of his employment with the respondent. In the circumstances the claim under the Unfair Dismissals Acts, 1977 to 2007, fails because the Tribunal is not satisfied that the claimant's employment ended for any reason other than a genuine shortage of work. The Tribunal is also satisfied that there was not an unfair selection for redundancy as all three drivers were put off work in December 2010, the respondent believing that all three had received the notice of 3 December. The claimant did not seek any clarification of his position following receipt of the text of 3 January from DS, reassuring him that he would be given work once orders were received. For these reasons the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Section 23 of the Redundancy Payments Acts provides that where a former employee enters upon a subsequent period of employment with the same employer, continuity of employment is treated as having been broken where a redundancy lump sum payment had been paid in respect of the earlier period of employment with the employer. As the subsequent employment ended on 20 December 2010, the appellant employee does not have 104 weeks' service in the subsequent employment and is, therefore, not entitled to a redundancy payment. Accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

The First Schedule of the Minimum Notice and Terms of Employment Acts, 1973 of 2005 at

article 6 provides: *“The continuous service of an employee in his employment shall not be broken by the dismissal of the employee by his employer followed by the immediate re-employment of the employee.”* The Tribunal adopts the earlier decision of a division of the Tribunal in *Kenny v Tegral Building Products Ltd.* [2006] E.L.R. 309, where it held that the word ‘immediate’ was not to be taken literally and a break of 24 days did not break the claimant’s continuity of service. In the instant case the evidence was that the break was less than 24 days. Thus, for the purposes of the Minimum Notice and Terms of Employment Acts, the claimant has continuity of service from the date of the commencement of his first period of employment with the respondent. The Tribunal does not have to resolve the dispute as to whether the employment commenced in February 2004 or 2005 as in either case the entitlement to payment in lieu of notice is four weeks. As the claimant did not receive any payment in lieu of notice the Tribunal awards him the sum of €2,000.00, this amount being equivalent to four weeks’ gross pay (as assessed by the Tribunal at €500.00 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the  
Employment Appeals Tribunal

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