EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.

RP2333/2011
UD1798/2011
WT708/2011

MN1851/2011

against
EMPLOYER - *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr D. Peakin
Mr P. Trehy

heard this claim at Dublin on 6th February 2013

Representation:
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Claimant(s) :

Respondent(s) :

The claims under the Redundancy Payments Acts 1967 to 2007 and the Organisation of Working Time Act 1997 were withdrawn by the claimant's representative at the commencement of the hearing.

Preliminary Issue

The respondent's representative submitted that the claimant did not have the requisite service to

bring a claim under the Unfair Dismissals Acts. The Tribunal was told that the claimant commenced working for the respondent in January 2008 and his employment terminated in May 2011. The claimant worked for the respondent from January 2008 until 21 March 2008 when he sustained an injury in the workplace. Thereafter he was absent from work on medical grounds until the respondent terminated his employment in May 2011.

Section 10 of the first schedule of the Minimum Notice and Terms of Employment Acts 1973 to 2005 provides inter alia that: *if an employee is absent from his employment for not more than twenty-six weeks between consecutive periods of employment because of sickness or injury such period shall count as service.*

The respondent's representative submitted that any period in excess of the above should not be treated as computable service and therefore the claimant did not have the requisite service to bring a claim under the Unfair Dismissals Acts 1977 to 2007. The claimant was absent from work from March 2008 onwards because he was certified as being medically unfit to work by his medical advisor, not because he had purportedly reached agreement with his employer.

The claimant's representative submitted that the claimant was in continuous employment for approximately three years and the respondent clearly stated by way of letter dated 13 May 2011 that his date of termination of employment was 20 May 2011. He was on the employment books of the respondent for three years with the agreement of his employer and medical certificates were submitted and accepted by the respondent for his absence.

As the T2 was only submitted prior to the hearing date, an opportunity was given for the Claimant's representative to address the issue raised as to the lack of any jurisdiction of the Tribunal to hear the case as the Claimant did not have the requisite service. Both sides were given an opportunity to address the issues raised by way of written submissions.

Determination

1. There are several exclusions to those who can claim relief under the Unfair Dismissals legislation. Such exclusions are set out at Section 2 of the Act. With stated exceptions, an employee must have at least 52 weeks' continuous service with the employer before he can bring relief under the Unfair Dismissals Act.

2. The Rules for the computation length of service are set out in Section 2(4) of the Unfair Dismissals Act which states that "*The First Schedule to the Minimum Notice and Terms of Employment Act, 1973, (as amended by section 20 of this Act), shall apply for the purpose of ascertaining for the purposes of this Act the period of service of an employee and whether that service has been continuous."* The Respondent submits that this interpretation includes a 2 stage test and that the service requirement in the First Schedule comprises of two elements of both continuity of service and also computable service. In effect, to assess "Continuous service", the Tribunal has to assess both the time period of service and also if the service has been continuous.

3. "Continuity of Service" is calculated by reference to the First Schedule of the Minimum Notice and Terms of Employment Act 1973 (as amended) which provides that service is to be deemed as continuous unless terminated by

a) Dismissal by the employer

b) The employee voluntarily leaving the employment.

4. "Computable Service" is stated (at Paragraph 10) as including an absence from employment of not more than 26 weeks between consecutive periods of employment because of

a) A lay-off,
b) Sickness or injury, or
c) By agreement with the employer
shall count as a period of service.

5. In this case, the Claimant worked with the Respondent from January 2008 to March 2008 when he sustained an accident at work. The employment terminated on the 20th May 2008, with a P45 issuing on the 22nd June 2011. The employment was continuous during that time as there had been no act by either party to terminate the employment until the time of the dismissal in May 2011. It has been accepted by the Respondent that there was continuity of employment throughout this period.

6. The Respondent however submits that the Claimant did not have the appropriate period of one year (52 weeks) of computable service. The Tribunal must now assess the "*the period of service of the employee."* The claimant states that the employmentcommenced on the 1st January 2008 whereas the Respondent states that this commencedon the 19th January 2008. Both parties agree that the accident at work was the 21st March 2008. Thereafter, the Claimant has been out of work and did not return, finallyreceiving a P45 in June 2011.

7. It is clear from the First Schedule that a period of absence of "not more than 26 weeks" due to lay off, injury or with agreement of the employer will count towards service. Therefore, a period of 26 weeks absence by the Claimant (either through illness or with agreement as submitted by the Claimant) would be counted towards calculation of his service with the respondent.

8. The converse situation, being absence for more than 26 weeks is not dealt with explicitly. The Respondent, by way of submission states that in reliance on the maxim of *expressio unius exclusion alterius* that anything that is expressed must be taken to exclude something else. This maxim states *"where the legislature in the text deems it appropriate to expressly cater for particular matters, and could have included other matters, but did not, then the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision."*

9. The Tribunal takes the view that the period of 26 weeks sickness or illness would count towards the service of the Claimant. The Tribunal notes the submission of the claimant 's representative that there was agreement with the employer for the claimant to stay on the books, however, even if this was the position, the Tribunal could only assess a period of 26 weeks as service of the Claimant and not any period in excess of the 26 weeks given Section 10 of the First Schedule.

10. It would follow that a period in excess of the 26 weeks is not computable. In this case as presents before the Tribunal, the continuity of employment is preserved but in a situation where the service after 21st August 2008 was not computable. Therefore, the

Claimant on his own submission (at the outer limit) had 38 weeks of *computable* service and on the Respondents' submission had 35 weeks *computable* service. Even factoring in any additional period of notice, the Claimant still falls short of the required 52 weeks of computable service.

11. Therefore, after careful consideration of all the legal arguments submitted, the Tribunal finds that the claimant did not have the period of service required to hear and determine his claim.

12. By reason of the foregoing, both claims under the Unfair Dismissal Act and under the Minimum Notice and Terms of Employment Act fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)