

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO.
UD1433/2005
RP633/2005
MN1052/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.
Members: Mr D. Hegarty
Mr J. McDonnell

heard this claim at Cork on 5th March 2007
and 14th May 2007

Representation:

Claimant: Wayne Anthony Lewis BL
Employment Advice & Representation Unit (EARU), 3 Hills
Complex, Lucan, Co. Dublin

Respondent: Killian O' Mullane solicitor of Murphy English & Co.,
Solicitors, "Sunville", Cork Road, Carrigaline, Co. Cork

The determination of the Tribunal was as follows:

Respondent's case:

The Managing Director (MD) of the respondent company told the Tribunal that the company is a second-fix carpentry company and its work includes hanging doors and fitting skirting boards and architraves. It generally has around twelve employees. The company works on a subcontracting basis, usually doing commercial work. At the beginning of a job the company is given a bill of quantities by the main contractor and the respondent submits the meterage and price to the main contractor. The employees do either price work or day work. Price work is paid per item and day work, such as blocking holes, is paid on a day rate basis. The claimant worked with the respondent from September 2002 until October 2005. Two years into his employment the claimant was promoted to the position of foreman but he also continued doing carpentry work. As foreman, he

was in charge of between four and eight workers.

MD first became aware that there was a problem with the claimant when an employee (MM) asked him how he could become a foreman. Something alerted MD and when he “pressed” MM, he told him that the claimant was leaving the site early every day and the others had to do his share of the work. MD was shocked at this because he trusted his foremen whose duties include ensuring a job is well done, getting the day work done and signed up and noting how much price work is done on site. MD placed another employee (XC) on site Y to observe the claimant and report to him.

MD was shown phone-camera footage (which was opened to the Tribunal) of the claimant asleep in a van during working hours. The footage was opened to the Tribunal. XC informed him, on a daily basis, that the claimant was absenting himself from the site. The claimant was the only one on the price work on the site and MD was billing the main contractor on the figures given to him by the claimant. MD took over the job himself when it was about three-quarters way through and he discovered that it had been under-priced by about €25,000 to €30,000. On another occasion MD was on site Y between 09.15 a.m. 14.15 but the claimant was not present during that time. That afternoon he was informed in telephone calls that the claimant arrived back to the site at 15.10 but left it again at 15.30

When MD spoke to him, the claimant admitted to leaving the work, apologised and accepted that he was at fault. He told MD that he had a family issue about someone not attending his forthcoming wedding. MD decided to let the claimant go. He could not demote the claimant because the other employees would think that they could do as the claimant had done and would walk all over him.

He agreed that he had dismissed the claimant within two weeks of receiving the complaint. He had lost trust in the claimant. He was paying the claimant to do work which the claimant was not doing. MD only became aware of fair procedures after the dismissal. MD did not go to the claimant’s wedding as he was under pressure at the time. He did not accept that the claimant was leaving the site to buy tools. He had not authorised the claimant to leave the site or to take different lunch breaks from the workers.

A former apprentice carpenter, who had worked on site Y for three weeks while the claimant was foreman there, told the Tribunal that the claimant frequently left the site in the mornings for between one to three hours, arrived back around the time of their second break, left again until 03.00 and “was gone” by 04.00; he and the other employees there used to see him drive out of the car park; sometimes the claimant sat in his car reading the newspaper. The claimant remained around the site on Friday afternoons to give them their pay cheques. One Friday afternoon he took a picture on his phone camera of the claimant asleep in his car; he had been asleep in the car for nearly two hours. Taking the picture was a joke and was not taken to get the claimant in trouble. Word got back to MD about the footage and he asked to see it. Out of the fifteen days the apprentice worked on site Y the claimant left the site on thirteen. He informed the respondent about the claimant’s absences from the site in around the end of 2005.

The Project Manager on site G told the Tribunal that the claimant had worked on that site in 2004 and 2005, prior to his going to site Y. He had no problem with the claimant. He was a very good carpenter and was also good with the client. At the snagging stage it came to his attention that the carpentry snagging was falling behind and on enquiry he was told that the claimant was missing. He telephoned the claimant about this on a few occasions and he said he had to go home. He was advised to get rid of the claimant if he wanted to get the snagging finished on time but he desisted because the claimant’s work rate was good. He had not spoken to MD about this prior to the

claimant's dismissal.

A carpenter who is employed by the respondent told the Tribunal that the claimant did not arrive to work at the correct time and left at 04.00, which was an hour before finishing time. Frequently, MD was not on site when they needed him and they had to telephone him. When he asked MD what were the duties of the foreman, he told him that it included allocating work, working like everybody else on site and being the last to leave the site. He spoke to MD about the claimant while he was working for the respondent. MD told him that he would check the matter. He did not know why the claimant left the site early.

Another employee XC told the Tribunal that MD asked him to work on site Y for two weeks to "see what was going on". XC found that the claimant arrived to work late and was coming and going throughout the day; he (the claimant) was present on the site for only three or four hours of the eight-and-a-half-hour day. MD phoned him regularly throughout the day to find out what was happening. The claimant did not say where he was going when he left the site nor did he ask him; it was not his function to do so.

Claimant's case:

The claimant told the Tribunal that he commenced work with the respondent as a carpenter and got on well with MD. In the late summer of 2004 he was made a foreman. He "totally refuted" the complaints alleged against him in relation to his time on site G. At the respondent's request he was looking after employees from other sites where work was ending. He also visited another site and used to also leave the site to get replacements for the worn out tool parts. It was a large site and it was not possible for the complainants to observe him at all times that he was on site.

The claimant maintained that he was only working on site Y for one month prior to his dismissal. At that time he was under stress as: he was getting married on 5 November 2005 and someone close to him was not coming to the wedding; he had purchased a house and had a mortgage. The stress got the better of him and he was absenting himself from work without informing MD, either about his difficulties or that that he was leaving the site. Whilst he was absenting himself from the site throughout that month, the absences were more frequent during the final two weeks. He realised that this was not acceptable behaviour but felt it warranted a reprimand rather than dismissal. His absences were due to a lack of motivation and depression. He has a history of depression and had suffered panic attacks in 2001 but on the doctor's advice he learned to cope with it at the time through reading rather than taking medication. He did not attend his doctor for his depression in September/October 2005. He regretted not having spoken to MD about his situation but due to his depression it did not occur to him to do so. He had not considered how his behaviour might affect the employees under him. Whilst MD and he generally measured the work together he admitted that he might have once measured on his own.

On 27 October MD was on the site when the claimant arrived there. MD told him that he had to let him go because he had been missing from the site and because of the camera footage showing him asleep in the van. He pleaded with MD for his job. MD took his keys and dropped him back to the city. He did not expect to be "fired on the spot". He told the MD that he needed the job and about the pressure he was under. MD told him to go away and get married and they would talk on his return. The claimant believed that the matter could be resolved. In a subsequent telephone conversation MD informed him that he was not attending his wedding; the claimant felt alarmed by this. On his return from his honeymoon his P45 had been delivered to his house. He had never received any warnings. The functions of a foreman had not been explained to him at the time of his

promotion, nor did he receive any training but he understood the duties of a foreman.

Determination

Whilst the claimant admitted to the respondent that he had been absenting himself from site Y and sleeping in the van during working hours the Tribunal feels that summarily dismissing the claimant without giving him an opportunity to explain his position and/or mend his ways was harsh and unfair. Furthermore in failing to provide the claimant with an opportunity to answer the allegations against him, the respondent was in breach of one of the main principles of natural justice. Accordingly, the Tribunal finds that the dismissal was unfair. The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds.

Whilst the claimant admitted to absenting himself from site Y there was a conflict of evidence as to whether he had been absenting himself from site G. The Tribunal accepts the evidence of the Project Manager on this issue. Taking that evidence and the fact that the claimant was a foreman in whom a high degree of trust had been reposed the Tribunal finds that the claimant made a significant contribution to his dismissal. Having taken this contribution into account the Tribunal awards the claimant compensation in the sum of €9,500 under the Unfair Dismissals Acts, 1977 to 2001.

The Tribunal awards the claimant the sum of €1,920, being two weeks' pay in lieu of notice, under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

A redundancy situation did not exist in the respondent's business. Accordingly, the appeal under the Redundancy Payments Acts 1967 to 2003 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)