

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:

CASE NO.

Employee

MN8102008  
WT363/2008

-

RP756/2008  
UD882/2008

against

Employer

**-respondent**

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. M. Forde  
Mr K. O'Connor

heard this claim at Cork on 11th March 2009

Representation:

\_\_\_\_\_

Claimant :

Ms Jane Anne Rothwell, B.L., instructed by Denise Kelleher & Associates,  
Solicitors, Unit 4, Gleann Alainn, Ballygarvan, Co. Cork

Respondent :

Director

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

### **Claimant's case:**

The claimant commenced his employment with the respondent in March 2003 as a finishing foreman. His job was to finish off houses for hand over to the customer. When he went to the site in Bandon he was made site foreman. From 2004 he had a company van on a fulltime basis and this included the weekends. He also had a company mobile phone. BH the managing director was his main point of contact. From time to time he was also asked to do other work on the family farm. He worked 5.5 days a week as site foreman and could sometimes work extra hours to get houses finished. On 15<sup>th</sup> May 2008 B the owner, hereinafter referred to as B asked the claimant if he would go to Goleen in West Cork to do list of jobs which included repairs to a house. Two employees were asked to go to West Cork with the claimant. They left for West Cork at 6.30am and were finished at 8pm. To have to work those long hours was unusual. At 6pm B phoned the claimant asking if he was finished and would he come to his house to do some work on the guttering. As the claimant and the other two employees were on their way home B phoned again and asked the claimant was he coming to his house to do the job as requested. Within a few minutes he rang again. At this late stage it would take a half hour to three quarters of an hour to get there and it would mean working in the dark. The claimant refused to go to his house as that late stage as he was too tired and it was too late.

The following day which was Friday the claimant did his days work. At 5pm he received a phone call from B asking him to bring the van to the office and to leave the key with M his daughter at the office. This was the first time he had been asked to return the van. He told M that B her father had asked him to bring back the van and the keys and she commented that he was dead right. He got a taxi home that evening. On Monday 19<sup>th</sup> May 2008 he went back to work and was told to collect the van. He did all the jobs that were asked of him during the day. At 5pm he was finished work and as he was heading home B rang him and asked if he had finished cutting the grass in a housing development. B then hung up and phoned back asking the claimant to return to the site and BH would meet him there. The drive back to the site would take ten to fifteen minutes. When he got back the accountant was there to meet him as BH was on his honeymoon. As he handed him the key he also asked for the phone. The claimant gave him the sim card and he was told that BH would be back on the Wednesday and that he would meet the claimant. When the claimant asked was he fired he was told it was not for him to say. On the Wednesday he sent a text message to BH giving him his own mobile number and he also gave this number to JH, the other brother who is involved in the business. On 5<sup>th</sup> June which was over a week later, he phoned from his mothers phone and the respondent said he would phone the claimant but he did not do so. He was paid to the end of week 19<sup>th</sup> May 2008. The claimant did not know where he stood and he got through to BH eventually and asked for his P.45. There was no discussion and he did not contact the claimant and let him know the position with his job. The claimant had not taken his summer holidays and was due two weeks. He then told the Tribunal of his efforts to obtain alternative employment.

During cross-examination it was agreed that the claimant was due 7.5 days holidays. Witness said he did a course to work as foreman and the respondent paid for it.

### **Respondent's case:**

Tribunal heard evidence from a director who runs this family with her two brothers. She runs the office and her two brothers run the sites, one in Bandon and the other in Middleton. If there were any issues an employee would come to either herself or her brothers. She instructed the claimant to go to Goleen in West Cork on 15<sup>th</sup> May 2008, to cut the lawns and two others went with him. The

claimant was never asked to do overtime. The employees work a half day on a Saturday from 8am to 1pm which is optional. On Monday 19<sup>th</sup> May she was on a day off but the claimant could have contacted her on the Tuesday. Her brother BH who is hands on was out of the country at the time but she could have sorted it out. The claimant was not taken on as foreman. On the Tuesday the claimant did not come back to work but they paid him for the full week. It was not up to the respondent to go chasing an employee. This scenario is not unusual in the construction sector. They have twenty-two employees and as of the date of this hearing they had not let go any employees.

In cross-examination witness said they did not contact the claimant after 19<sup>th</sup> May as they took it that he wanted to leave. While this was the only occasion the claimant had been asked to bring back the van it was unusual for anyone else to use it. It was not unusual to pay him for the remainder of that week as he would have been due some holiday pay. A few employees would go missing for weeks.

In answer to questions from Tribunal members witness said there was no issue in relation to the claimant handing in the van on Friday and collecting it again on Monday. The van was there on Tuesday to be collected and witness was there to meet the claimant if he came in to work. It was not unusual in the construction sector not to turn up for work. She did not know if B, her father told the claimant to do the work on the farm. B was the owner of the company but he had been retired for the last five years. In the last four years the claimant took home the van every night and he also had the company phone.

The accountant also gave evidence to the Tribunal. On Monday 19<sup>th</sup> May 2008 B asked him to wait in the office for the claimant and to come back with the van and the phone. The claimant gave him the keys of the van and the phone. The claimant asked was he fired and he told him it was not for him to say. It does happen that guys would go off for a few days and if the respondent wanted them working again they would come back. When the wages are done on the Wednesday they pay for the Thursday and Friday of the current week and that could be adjusted the following week if necessary. The van was there for the claimant on the Tuesday.

In cross-examination witness said that B would ring him occasionally and if he gave an instruction he would follow it.

In answer to questions from Tribunal members witness said it would be unusual to ask an employee to leave back the van and the phone.

### **Determination:**

The Tribunal having heard all the evidence that on 19<sup>th</sup> May 2008 the claimant was instructed to leave the van and phone. He tried contacting the respondent but he never returned his call. The Tribunal is unanimous that the claimant was dismissed on 19<sup>th</sup> May and it awards him the sum €18,000.00 under the Unfair Dismissals Acts 1977 to 2007. The claimant is also awarded the sum of €1,195.74 under the Organisation of Working Time Act, 1997 and €1,594.32 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. No award is being made under

the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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

