

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
Employee

CASE NO.  
UD330/2006  
MN183/2006

against  
Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Sheedy  
Members: Mr G. Phelan  
Dr. A. Clune

heard this claim at Limerick on 18th July 2007

#### Representation:

Claimant: Ms Elizabeth Cogan BL instructed by Ms Elaine Hickey of  
Mr. Eugene Smartt, Solicitors, Newlands Retail Centre,  
Newlands Cross, Clondalkin, Dublin 22

Respondent: Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,  
Bishopsgate, Henry Street, P.O. Box 146, Limerick

The determination of the Tribunal was as follows:

#### **Background:**

The Respondent company is a construction company and the Claimant was a heavy goods vehicle driver in the company.

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

The Tribunal heard evidence from the foreman of the Mitchelstown site who was responsible for the employees on the site. He told the Tribunal of an incident whereby he was in work and at circa 8.00 a.m. he saw the Claimant and a co-worker (Mr. C), asleep in a private vehicle which did not belong to the Respondent. He tapped on the window and the Claimant rolled down the window. He could get a strong smell of alcohol.

The witness explained to the Tribunal that the Claimant was a driver of a 30-ton truck and that in his opinion the Claimant was not in a fit state to drive.

He then contacted the general foreman and told him that he was going to give the Claimant a verbal warning. He then gave the Claimant a verbal warning and sent him home.

Cross-examination: The witness was asked if he explained to the Claimant that the verbal warning could lead to his dismissal and he replied, "No". He did not tell the Claimant the duration of the warning. The verbal warning was not followed by written warning or confirmation in writing. He explained that he was aware of the procedures and aware a written warning was required before dismissal. He was not aware that the Claimant was given documentation about intoxication in work but there had been notices in various areas about that issue.

The Tribunal heard evidence from the contracts manager. He was responsible for overall planning and day-to-day running of works. He was also responsible for employee's welfare. In December 2005 just before the Christmas break he became aware of an incident. The truck that the Claimant was in charge of was abandoned on the Fermoy site. They finished work at 1.00 p.m. on that day and the Claimant left at 10.30 a.m. The witness explained that if a worker had to leave the site urgently they would tell the foreman or the engineer. They did not contact the Claimant. Management decided to talk to the Claimant when the work resumed after the break.

They all returned on the 3<sup>rd</sup> January 2006. On 3<sup>rd</sup> January there was another incident whereby the Claimant drove over bollards. The bollards could be filled with either liquid or sand. They could be interlinked and were designed to demark areas for safety. They were not designed for high impact.

He contacted the director of the site and had a discussion with him. He then told the Claimant that he was giving him notice that his job was terminated. He gave him notice up until the end of January. The Claimant was surprised. He spoke to the Claimant about the incident prior to this that had happened in December. The Claimant admitted that he had had a few arguments with a foreman.

At a later time the Claimant phoned him and asked if he could leave before notice ended as he had secured work. The Claimant told him that it was on one of the Respondent company's sites that they were that main contractors. The Claimant asked if it was "OK" for him to work on the site. He told the Claimant that it was not but that he would phone the director of the site. He spoke to the director and the director was of the same opinion as him. He phoned the Claimant to tell him this. He had no further dealings with the Claimant.

Cross-examination: The witness was asked if he had a discussion with the Claimant about the incident on December 21<sup>st</sup> on the day of the incident and he replied, "No". He did not verbally warn the Claimant because the Claimant had left the site. He informed the Claimant of this on 3<sup>rd</sup> January. The Claimant was not given a written warning.

The witness explained that he did not give the Claimant directions about the bollards. He accepted that the bollards were probably not filled at all. The witness accepted that he did not see the Claimant driving over the bollards; a foreman phoned him to tell him of the incident. After the discussion with the foreman and the director he spoke to the Claimant and listed the difficulties that they had with him.

He did not give the Claimant an opportunity to have representation. He did not consider suspending the Claimant on full pay. He was not aware if the bollard incident was investigated.

The witness was asked by the Tribunal what his research into the matters entailed. He explained that he phoned the foreman on the other site. He did not look at the personnel file, as he preferred

the information first hand.

**Claimant's case:**

The Claimant gave evidence to the Tribunal. He commenced working for the company in August 2003. He worked on various sites. He initially worked on a site in Kildare for four months and he had no difficulty there. He worked in Galway for one year and had no difficulty although he received one warning for not wearing a high visibility vest. He did not get a written warning for not wearing the vest.

Regarding the incident on 12<sup>th</sup> December 2005, the Claimant explained that he and Mr. C were collected by a colleague to bring them to work. They arrived and were asleep and they did not get out of the vehicle. The foreman knocked on the window and told them that they were being sent home. The next day they were in work they were told that they were given a warning. They were not told that it could lead to dismissal.

The Claimant explained the next incident whereby he left work at 10.30: It was the morning after their Christmas party and he crashed his car on the way to work. He explained that he left and that he did inform a colleague to tell the foreman that he had to leave.

He returned to work after the Christmas break. Management did not contact him. He got no written warning and there was no contact regarding a warning.

The Claimant explained about the bollard incident. He was driving on the site and on the road they were constructing. Bollards were slanted on the road blocking the route. He was driving about two miles per hour and pushed the bollards aside.

He was approached by the contracts manager who told him the names of three people who were foremen and engineers and that they had said that they did not want to work with him. The contracts manager told him that he had a bad manner. The contracts manager told him that they had wanted to do this before Christmas.

The Claimant explained to the Tribunal that he was never told this before. He was never told of the duration of a warning. He was never told of a further step from a verbal warning. He was never given an option of going to another site.

Cross-examination: He Claimant was asked if he received a warning in August 2005 from a Mr. Q. He explained, "We had words but not made it clear it was a warning. No he never said to me it was a warning, we had words". He was asked about the incident in December 2005 regarding alcohol the Claimant explained that it was not appropriate behaviour but he did not get out of the vehicle.

The Claimant was asked about the incident whereby he left the truck outside the designated area and he explained that he told a work colleague that he was leaving the site.

Regarding the bollard incident he was asked why a foreman would say that he drove over the bollard. The Claimant answered, "Because he had a gripe".

The Claimant agreed that he was given an option to work notice and chose not to.

**Determination:**

The Tribunal determines that the Claimant was given notice. Accordingly the claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, fails.

The Tribunal find that the Respondent did not operate fair procedures in this case. Therefore the Tribunal finds that the Claimant was unfairly dismissed. The Tribunal awards the Claimant the sum of €4,000.00, under the Unfair Dismissals Acts, 1977 to 2001, this taking into account that the Claimant contributed to his own dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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