

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD41/2007
MN26/2007

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: Ms. C. Gleeson B.L.
Members: Mr. R. Prole
Mr. A. Butler

heard this claim at Dublin on 8th May 2007 and 2nd November 2007

Representation:

Claimant(s) : Mr John Bourke, Solicitor, Bourke & Company, Solicitors,
169 - 171 Drimnagh Road, Walkinstown, Dublin 12
Respondent(s) : Mr. Richard Clinch, Solicitor, Seamus Maguire & Co., Solicitors,
10 Main Street, Blanchardstown, Dublin 15. (1st Day of Hearing)
Mr. Colm Hennessy B.L. instructed by Mr. Fergal Dowling, Solicitor,
Seamus Maguire & Co., Solicitors,
10 Main Street, Blanchardstown, Dublin 15. (2nd Day of Hearing)

The determination of the Tribunal was as follows:-

Claimant's Case:

As dismissal was in dispute, the claimant gave evidence. The MD of the respondent company came to the claimant's house and said he was starting a new company and he wanted the claimant to join him. The claimant had no experience in the area at the time. His experience was in ducting, the new job was in air-conditioning, canopy cleaning (in kitchens) and water tank cleaning. The work was new to him even though he had experience in working with ceilings and partitions. The MD told him that he would be the foreman and would have two people working to him. He was the van driver and was supplied with a van to collect materials for jobs, collect and deliver his staff to and from their homes. The hours varied depending on the nature and location of the job and would sometimes involve night work. He would be notified the evening before by telephone from the MD, the nature of the work the following day.

The claimant worked for the respondent for three years and had no problems. His staff could do any job he assigned to them. The claimant filled in the timesheets with the name of the job, duration and nature of the work done. Most jobs required them to sign in and out of buildings for security reasons. He completed the time sheets upon returning home in the evening and would submit them to the office over the weekends or by email at night. There was no set procedure.

In August 2006, he was invited to attend a meeting in the office with the MD regarding timesheets and the fact that some people were signing in from their home and not from the workplace. The claimant was not one of these people. He was allowed to include his departure from home as he was the van driver.

The claimant received a solicitor's letter dated 12th January 2007 regarding an incident that had occurred in early October 2006. The claimant had been requested to collect a pair of steel-toe boots for an employee, but he did not get the time to do it. He had another set in the back of the van that would be adequate for the job the employee had to do. Employees were not allowed on sites without these boots. The employee had asked the claimant to purchase the boots, he did not and he told his employer that he had. The claimant was called into the office and told that he was suspended for the day. The meeting took place in the car, in October 2006 when the claimant was giving the MD a lift home. He acknowledged to the MD that he had not purchased the shoes. He was told that "this cannot happen again" and that there needed to be "trust built up between (them)". The claimant received a verbal warning in the car but was not invited to a meeting. There were no procedures followed. The claimant had no contract. There were no grievance or warning procedures in place at the company. If the claimant had any problem he could always go to the MD directly.

On the 27th October 2006, the claimant was asked to go to a restaurant at 8.00am for a particular job. He was working on his own that day. The MD had arranged with a new employee (NE) to meet the claimant at a pre-arranged location for a lift. NE was to telephone the claimant when he got to the location and the claimant would collect him. It was an inclement day and by the time the claimant got to the job location, the MD had telephoned and arranged another job at another location. The claimant brought NE with him and they stopped at the claimant's house for a break for about fifteen minutes. This was normal procedure. They proceeded to the job location and completed their day's work. A few days later the MD accused the claimant of falsifying hours and of not being where he said he was.

A letter issued on the 3rd November 2006 regarding this matter and the claimant was pretty annoyed at the time. He threw the letter out and treated it with contempt. He thought the matter was over and done with and the MD's mind was made up at that point. He had never received a letter like that previously. The working relationship between them had been good up to that point. The claimant and the MD had words and the claimant apologised for not purchasing the boots.

In the week of the 12th November 2006, there were two more incidents regarding timesheets. The first one was on a Friday, at an office block. He had completed his duties by 12.30pm and the MD told him to "hold on" and not to finish too early. The second incident occurred when he finished on a Friday at 8.00pm and he put 8.00pm on his timesheet. He was called into the office on the following Monday. The MD had telephoned the location and confirmed that he had left at 8.00pm. On the 15th November 2006, he commenced at 6.30am and finished by 12.30pm. He said to his colleague not to leave too early as the company had complained before, so they waited until 2.00pm and then left. He didn't include this time on the timesheet. When he was called to the office regarding all three incidents, he explained that he had not falsified the timesheets. He was told he was suspended for one week. He was asked for his diesel card, keys of the van and telephone. The MD got another employee to drive him home. The claimant couldn't understand what had happened and felt he had lost the trust of the employer. He couldn't work under these conditions and felt his future was elsewhere.

Upon receipt of a solicitor's letter offering him his job, he felt that he could not return. When he tried to talk to the MD, the MD told him he was not willing to discuss it. He did not offer any witnesses as he didn't want to drag any other employees into the matter.

Under cross-examination, the claimant agreed that he had told the employer that he had purchased the boots when he had not. He accepted that the safety of the employees was the employer's paramount concern. NE, that the claimant was collecting at the bus stop, was supposed to telephone him to tell him he was there. He was not aware at the time that the person had been waiting at the bus stop for two hours. The claimant gave further evidence of timesheets. The claimant worked unsupervised and was responsible for his own timesheets. The claimant established loss for the Tribunal.

The claimant outlined his daily duties to the Tribunal and said that he was never supervised. On the 27th October 2006, the claimant was meeting with the new colleague. He was at a job for an hour and a half before the MD telephoned him enquiring about his whereabouts. Regarding the safety boots, the claimant said that the alternative pair would suit the employee until he had a chance to procure a new pair. The incident over the timesheets occurred because he had been asked by the MD to remain in the location longer than the job had taken on a previous occasion. He thought it might be a contractual matter between the MD and the client. He was "hanging around" for an hour and a half to make up his hours. The day after he was suspended for one day, he reported for work as the MD had asked him to attend. The claimant had no other avenue of complaint at the company. When he was suspended for one week, the claimant felt he could not return to work for the respondent.

Respondent's Case:

The new employee (NE) that was not collected by the claimant gave evidence. He commenced employment with the respondent company as part of a Fás course. He was told to report to a bus stop at 8.00am on the 27th October 2006 and he waited for an hour and a half in the pouring rain. The claimant arrived at 9.30am and said he had been delayed by traffic. They went to the claimant's house for a break and arrived at work at 10.30am. The claimant told the MD that NE was the one that was late. The MD had queried him at a later stage. NE explained the sequence of events to MD. Regarding the incident in the office block, NE said that he and the claimant had finished their duties and were sitting down for over an hour before they left. The claimant said they were making up hours. NE told the MD. Under cross-examination, NE said that the first day was the only time he had to get the bus to work, the claimant collected him every other day for work and dropped him home.

Another employee gave evidence. He had three and a half years' service with the respondent. He had been promised a new pair of boots for safety reasons. The claimant told him to wear the pair that were in the van. They did not fit. He asked the MD on a number of occasions for a new pair. The MD had told him that the claimant had purchased them. Some duties were done at night and the witness had no problems approaching the MD and asking for hours in lieu. Under cross-examination, the witness said he had a good working relationship with the claimant. He fills out his own time sheets based on a system of trust. He was not aware of any discrepancies on the claimant's timesheets and was never asked to stay behind to make up time.

The MD gave evidence. He told the Tribunal that he had started the company four years ago and offered the claimant a job. He now has nine employees. When he recruits a new employee, he sits them down and explains their terms and conditions to them. The claimant had no experience in the area but was well aware of all the health and safety regulations in the industry based on his previous experience. All new employees were sent on courses for their safety documents for site work. This was at the expense of the company. He instructed the claimant to include hours on his timesheets for time spent in the van going to and from work with the other employees. When the company expanded, he had a meeting to inform all of the employees that the claimant was the only one permitted to include these hours. The claimant was the first employee to be suspended from the

respondent company.

The MD gave the claimant a verbal warning for not providing a pair of safety boots to an employee. The claimant had told him that they had been purchased when they had not. When asked why he had not purchased them, the claimant said that he had no time. The MD was unhappy that the claimant had not told him the truth.

On the 12th October, the MD was told about the discrepancy on the claimant's timesheet. The particular job had been finished one and a half hours prior to what was stated on the timesheet. NE had brought it to his attention. He approached the claimant and asked for a reason and the claimant offered him none. He suspended the claimant for one day. He requested that the claimant hand in the company property

When the MD requested that the claimant meet NE at the designated bus stop on the 27th October 2006, he was surprised that the claimant had not done so when the MD telephoned him at 9.00am. The MD telephoned NE and discovered the claimant had not turned up. He felt the claimant was lying to him. The claimant's timesheet did not reflect the late start. The MD suspended the claimant for one day (Monday 6th November) and gave him a letter to state that fact on the 30th October. He was shocked when he turned up for work. The claimant said he realised he was suspended but thought there was equipment that the MD would need from the van. The claimant carried on working that day. No more was said about it.

Under cross-examination, MD said that the claimant blatantly lied to him regarding NE being late for work. He falsified his timesheets. He did not telephone the staff at the venue to verify whether the claimant was present that morning. He had telephoned him initially to tell him to relocate to a different job because of the inclement weather. MD expected any employee to come to him if they had a difficulty. If the claimant had told him he was unable to collect the boots, MD would have got them himself.

Determination:

Having considered all of the evidence in this case, the Tribunal is of the view that, in all the circumstances, it was not fair and reasonable for the claimant to consider himself constructively dismissed. The claimant did not meet the burden of proof required to establish that he was dismissed constructively by the respondent. Accordingly, the Tribunal determines that the claim made under the Unfair Dismissals Acts, 1977 to 1993, fails.

As the claimant was not dismissed from his employment by the respondent, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)