

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO. UD25/2008
MN259/2008

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 Flanagan BL

Members: Mr D Moore
Ms E Brezina

heard this claim at Dublin on 26th March 2008

Representation:

Appellant: Dr Gerald Kean, Keans, Solicitors,
2 Upper Pembroke Street, Dublin 2

Respondent: In person

The determination of the Tribunal was as follows:

The fact of dismissal was admitted. There had been a transfer of undertakings when the respondent took over from the previous employer of the appellant on 21st August 2007. The respondent had been a director of the previous employer which was a company called Advance Chemical Sales Limited. The respondent is a sole trader who trades under the trading name Advance Chemical Sales. On the consent of the parties the claim against the Advance Chemical Sales Limited was withdrawn and the name of the sole respondent was amended to Brian Cooney t/a Advance Chemical Sales.

Respondent's Case:

The registration of the trading name of the new undertaking was not finalised until September 2007. While the registration of the business name was being processed the respondent could not open a bank account in the name of the new undertaking. The respondent opened a bank account in the name of the new undertaking on 10th September 2007.

The respondent arrived at the business premises around lunchtime on the 24th August 2007. The appellant came downstairs from the office and there was an argument over the non-payment of wages. The appellant was verbally abusive. The respondent went to the office and the appellant

left the premises. The respondent then went to his mother's house. The mother of the respondent had control of the previous undertaking. The respondent called the office after lunch and told the appellant that he was dismissed. The respondent admitted that he had not paid the appellant his outstanding wages, even by the date of the hearing, but undertook to do so during the course of the hearing and at the request of the Tribunal.

Appellant's Case:

The appellant had been told prior to the company holidays that the respondent was taking over from the company. The appellant was given assurances that there would be no problem in receiving his wages. On the Friday before the holidays the appellant and the only other member of staff, the appellant's co-worker, had agreed to reduce their hours to part-time employment from 27th August 2007. The arrangement proposed was two days one week and three days the next week, at a rate of €100 per day. The two staff members could receive a Social Welfare payment for the other days.

The appellant was normally paid on Thursdays and became concerned when he had not been paid on Thursday 23rd August. The appellant was very concerned when the respondent arrived the following day at lunchtime. The appellant went downstairs and there was a row over the wages. The respondent did not explain that he could not pay the wages on time because the company registration had not been completed. The appellant left the premises and the respondent went upstairs. At around 2.20pm the appellant received a telephone call from the respondent who told him that he was dismissed.

The co-worker of the appellant gave evidence that the respondent's mother had telephoned in July and told her that she was retiring and that her son would be taking over the business. The co-worker was asked to inform the appellant of the situation. The co-worker also agreed to reduce her hours to part-time employment from the 27th August according to the terms outlined above. The co-worker returned to work after the holidays and on the Thursday they became concerned about their wages. The co-worker rang the respondent and asked if they would be paid, he replied that he did not know. The co-worker heard raised voices between the appellant and the respondent the following day at lunchtime. Afterwards the respondent came up to the office and made a call to his mother during which he asked his mother if he could dismiss the appellant. The respondent did not mention his banking problem to her until after the appellant was dismissed. The co-worker received no wages for a period of five weeks, but she was fully repaid outstanding wages by December.

Determination:

The Tribunal finds that this disciplinary matter was of insufficient gravity to amount to an act of gross misconduct; there was merely a case of the use of bad language. There was no application of fair procedures by the respondent in arriving at the dismissal. The Tribunal finds that the dismissal was unfair and therefore the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. The Tribunal orders the re-engagement of the appellant by the respondent according to the part-time arrangement previously agreed. The arrangement was that the appellant work two days one week and three days the next week, at a rate of €100 per day. This arrangement was intended to allow the appellant receive a Social Welfare payment for those days of the week not worked.

The Tribunal is of the view that the new working arrangement is highly beneficial to the appellant and unlikely to be bettered elsewhere. The Tribunal is also of the view that the loss suffered by the

appellant is primarily attributable to the failure of the appellant to make any kind of reasonable effort to obtain alternative employment. Given the appellant's clearly expressed belief that there was no point in seeking other work at his age and his apparent attitude of resignation to never working again and the near complete lack of motivation to find alternative work manifested by the appellant, the Tribunal wishes to indicate that had it awarded compensation for loss then that amount would have been, at best, quite modest. The Tribunal would also have to reduce the award further by an amount reflecting the extent to which the appellant contributed to the dismissal by his own misconduct. The Tribunal notes that the appellant chose compensation as his preferred remedy, however it is a matter for the Tribunal to determine the appropriate remedy, even where that decision is contrary to the wishes of one or even both parties.

The Tribunal notes that it was mentioned in passing that the employees were not furnished with a contract of employment in writing and wishes to draw the parties' attention to the obligations of an employer under the Terms of Employment Acts.

As the appellant is being reengaged it is inappropriate to make an award for lack of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 as the dismissal is effectively annulled by the decision to re-engage.

The Tribunal is of the view that this dispute arose out of the wholly unacceptable failure of the respondent to pay wages on time. It was particularly disgraceful behaviour by the respondent to have left the appellant without the wages due to him, even after the registration of the business name was processed and a bank account opened, for a period of some seven months from the due date to the date of the hearing. The dispute was provoked by the failure of the respondent to communicate his reasons for delay in paying wages, the failure to pay the wages on time, the lackadaisical demeanour displayed by the respondent coming in at lunchtime the day after the payment was due without any display of concern about the non-payment, and all at a time of transition for the business when employee's might be expected to be anxious. The language used by the appellant was inappropriate and was not the correct way to deal with the issue; however that was misconduct of a minor nature.

The Tribunal believes that the parties ought to look to what are now their real self-interests and move on from the original verbal dispute in a mature manner. Bearing in mind the robust language already used in their dispute, the Tribunal believes that neither party is of such delicacy that they cannot put the matter behind them.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)