

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD565/2007

MN416/2007

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. M. Forde
Mr. T. Kennelly

heard this claim at Limerick on 3rd July 2008

Representation:

Claimant(s): Mr. Michael Purtill BL instructed by Mr. Pdraig Mawe, Pierse & Fitzgibbon,
Solicitors, Market Street, Listowel, Co. Kerry

Respondent(s): Mr. Conor O'Connell, CIF, Construction House, 4 Eastgate Avenue, Little Island,
Cork.

The determination of the Tribunal was as follows:-

Background

Counsel for the claimant outlined to the Tribunal that circa November 6 the claimant was driving a van with materials in the back. The claimant was stopped by the gardai who warned him about the load. The maximum overloading was two feet. He told the respondent that he was concerned and that he would not carry pipes if they were in contravention of the law. Five days later on 31 January the claimant undertook work at JQ's son's house and the claimant was instructed to carry a load in contravention of the law and was summarily dismissed. The claimant did not resign or voluntary leave his employment. He refused to carry out an instruction as it was in contravention of the law. The claimant was entitled to notice and the claimant did not receive notice. The claimant made some efforts to look for work. The claimant did not have qualifications and he now undertakes some farming.

The respondent's representative outlined to the Tribunal that the claimant resigned following a dispute on 31 January 2007. The claimant refused to drive a van. A warning letter issued to the claimant on 26 January, which related to other matters. The employer at no stage dismissed the claimant. The claimant refused to drive the van.

Claimant's Case

The claimant told the Tribunal that the respondent employed him on 4 May 2004. He did not encounter problems prior to November 2006. He worked on a building site and JQ asked him to drive a van. He transported cement, sand, gravel, pipes and tools. Since May 2004 he carried pipes twenty-one feet in length. The pipes would overhang at the front of the van and he had to be careful to keep a distance of ten feet from the stop sign. A garda told him that he could be prosecuted for the overhanging and he could not remember when exactly this occurred but it was in 2005. He reported this matter to JQ and he refused to carry twenty feet pipes and comply with JQ's instructions. He then received a letter of warning on 26 January 2007. He always undertook his duties as best he could and he did not make numerous errors. Prior to receiving the written warning on 26 January 2007 he was told to cop on. It was all related to the pipes and there were no other problems. On 31 January 2007 he refused to carry pipes and he was not going to hurt someone or lose his licence. On 31 January while undertaking work in JQ's son's house JQ asked him what he was doing there. JQ told him that he had to drive the van and carry the pipes. JQ told him that he had no business here and to go away and he left and went home. The claimant knew he was dismissed, as he would not do what JQ wanted. No one approached him after that and he did not receive notice pay. Since then he rented land and he now has sixty cattle. While he was employed with the respondent he had thirty to forty cattle. He left school at fourteen without obtaining qualifications. He worked in a factory for a year and then commenced working in construction. He was happy working with the respondent and he did not plan to leave and he never left the job.

In cross-examination he stated that he worked with the respondent for two and a half years and he never encountered a problem. For the first couple of months he worked as a general operative.

Day to day he transported goods to other sites and driving the van was an important part of the job.

When he was stopped by the gardai he was told that he could be prosecuted. Asked if the respondent telephoned the garda station he replied he could not recall. Asked if the respondent informed him that the pipes overhanging at the front of the van was not in breach of regulations he replied that he telephoned the gardai station and he had to protect his licence. He continued with his duties some time after this. Asked if the warning on 26 January 2007 related to lost material he replied he could not remember. On 31 January 2007 he was at JQ's son's house. Asked if an argument developed with the foreman TW he replied that he told the foreman that he would not carry pipes and he told the claimant to get out of the van. He remained at the site until TW returned with the van and he then went to JQ's house. He told JQ's wife MQ that he would not carry the pipes. He could not recall saying that if he could not drive the van that he was gone. He was unsure if he met JQ that day and he spoke to him on a regular basis on the telephone. He told him that he would not drive a van with twenty feet pipes, as it was illegal. Asked if he drove for some years and never committed an offence he replied that he never knew the law until he found out. Asked what he did after 31 January 2007 he replied that he thought he went to the union and he then went to his solicitor. Asked if he never approached the respondent after 31 January he replied he never approached JQ. Asked how was he dismissed he replied he spoke to JQ about the pipes and he told him that if he was not going to carry the pipes in the van he had no business being there.

He received his P45 a week or two later.

He could not furnish his income from farming since February 2007. He registered with FAS but could not remember the date.

In re-examination he stated that he is in working and in receipt of unemployment benefit, which is legitimate and he is available for work.

In answer to questions from the tribunal he stated that he was not given a contract of employment. He was told verbally what to do. He telephoned the traffic department of the Garda station and he did not have proof of this. The gardai told him that the maximum that could over hang in the van was two feet. He reiterated that JQ told him to go.

Respondent's Case

JQ for the respondent told the Tribunal that the claimant was employed for two years with the respondent. He had a good relationship with the claimant's family and attended the claimant's brother's wedding. He first became aware of an issue of scaffolding pipes three to four weeks before the claimant left his employment. He checked with the garda station and was informed that he could carry three metres on the back of the van. He encountered some problems with the claimant in that material was delivered to the wrong site. The warning letter dated 26 January 2007, which was given to the claimant, was not related to pipes. He instructed the claimant to take pipes to a site and the claimant told him he would not do so. He asked another employee to drive the van and he told him that he would not take another man's job. He then asked the foreman TW to drive the van to the site. He did not telephone the claimant after that.

In cross-examination he stated that at present the respondent has twelve employees and at the time the claimant was employed it had over one hundred. At the moment it is difficult to get work. Employees did not have written contracts. He did not show the grievance procedure to the claimant. In January 2007 he had two drivers and nine to ten operators. Employees were employed as steel fixers and in shuttering. The claimant could undertake four or five different jobs with the respondent. On 31 January 2007 his wife told the claimant he could return to labouring. Asked if he accepted that the claimant had a genuine concern at the time he replied he might have and the claimant was very honest. Asked if he did not think it was appropriate to get written confirmation he replied that the claimant did not refuse to take the pipes prior to 31 January 2007. He checked with the gardai three to four weeks previously. Asked if the letter dated 26 January did not refer to goods being delivered to the wrong location he replied that he told the claimant verbally. After a contract had finished the claimant forgot to collect materials from the site. JQ did not undertake an investigation prior to dismissing the claimant and he did not dismiss the claimant. Asked if he did not investigate the matter he replied how could he know if he did not investigate the matter. When the claimant left he had had to take on another driver.

In answer to questions from the Tribunal asked when employees returned items from sites who signed for them he replied that the claimant did. JQ did not always see the dockets that related to the sites.

MQ, a director of the respondent company told the Tribunal that she helped as much as she could in the office. She had a good relationship with the claimant. She used to say to the claimant not to argue with JQ. JQ told her that the claimant refused to drive the van and the claimant said that he was not doing the pick up. JQ telephoned her and MQ told the claimant if he was not doing the pick up he could go on site. The claimant said that if he was not going to drive the van that he was going. MQ hoped that the claimant would report for work the next day. They had arguments in

the past but this time the claimant did not return. She thought very highly of the claimant and another employee took over the driving duties until November 2007. Then the foreman took over the driving duties and this meant that he would be off site.

In cross-examination MQ stated that she thought that the claimant would return. The claimant told her that if he could not drive the van that he was not returning.

Determination

On the evidence presented to the Tribunal there was clearly a conflict of evidence between the parties. The respondent did not have any disciplinary or grievance procedures in place for its employees. On the balance of probability the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the Tribunal awards the claimant compensation of €2,500.00

The claimant is entitled to two weeks minimum notice in the amount of €1,200 under the Minimum Notice and Terms of Employment acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

