

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD833/2006

MN548/2006

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: Ms. K.T. O'Mahony B.L.

Members: Mr. M. Forde

Mr J. McDonnell

heard this claim at Waterford on 8th April 2008

Representation:

Claimant:

Mr. Martin G. Lawlor, Coghlan Kelly, Solicitors, Trinity
Chambers, South Street, New Ross, Co. Wexford

Respondent: Mr. M. Crotty BL instructed by

Ms. Denise Fanning, Solicitor, Assistant Manager Of Legal
Services, DAS Group, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

The Evidence:

The respondent is involved in building, mainly in building commercial and retail outlets and employs around 200 employees. The claimant commenced as an employee with the respondent in September 2001, working as a general operative and grounds-man.

On 14 March 2006 the claimant pleaded guilty and was convicted in the District Court for driving away from a petrol station on ten occasions between mid July and mid November 2005 without paying for petrol. The petrol taken amounted, on average, to around €11 and on each occasion the claimant had paid for the other items he had purchased in the shop. The respondent had built the petrol station and in March 2006 the respondent still had to do snagging work at the petrol station. The final account for building the station had not been settled. At the time of the events herein the station had been assigned to a lessee.

The conviction was reported in a local newspaper the following week. Whilst the claimant sought

leave from work on two occasions for his court appearances, the site manager initially learned about the conviction from the report in the newspaper. When asked about the report the claimant admitted the conviction and said that he intended putting it behind him and moving on.

The claimant does not know why he committed the offences. He had been under severe personal strain in 2005: he is in his early thirties, has two young children, his personal relationship had broken up, he was also caring for his grandparents and his grandmother had passed away. He regretted the bad choices he had made and was relieved when the gardai questioned him. The court case was a strain, in particular because of his two children and having his name in the newspapers.

A garda sergeant told the Tribunal that the claimant made a full and frank statement admitting to all offences. At the court hearing evidence was tendered in mitigation and a light penalty was imposed on the claimant: he was fined €300 in respect of one offence and the other nine offences were taken into consideration (taken as convicted but not fined).

At this time the site manager was responsible for a building project at a book centre, which was “an alive shop” (the shop was open and the work was being done at night and weekends), and for snagging, including snagging at the aforementioned petrol station.

The Managing Director (MD) was out of the country when the report of the conviction appeared in the newspaper but a number of senior managers in the company had read the report and one of them brought it to his attention on his return. MD discussed the matter with his HR person and the site manager under whom the claimant worked and in reply to his query both told him (MD) that they had lost trust in the claimant; the site manager was sorry to have to say this but he was responsible for security. MD made the decision to dismiss the claimant. The HR person prepared the letter of dismissal dated 13 April 2006. The site manager called the claimant to one side and read the letter of dismissal to him; he explained to the claimant that he was being dismissed for misconduct outside the workplace. The claimant told him that he was trying to put the incidents behind him. The manager was sorry to have to inform the claimant about his dismissal. The claimant asked if there was anything he could do or if either he or the site manager could telephone MD. The site manager told him that he had tried to talk to the MD a number of times. There was a conflict of evidence as to whether the site manager had told the claimant that the owner of the petrol station had said to MD why should he pay him the €100,000 he owed when one of his employees was stealing from the station. Whilst the claimant believed that this was part of the reason for his dismissal the site manager denied ever having made such a statement to the claimant. There was no investigation of the incident and the dismissal was based on the newspaper report, apart from his having admitted it to the site manager.

The claimant took the letter of dismissal and left. Thereafter, he made a number of telephone calls to MD and while MD picked up the telephone once or twice he never spoke to the claimant.

Determination:

The claimant admitted the reported conviction to the site manager. In circumstances where there was a series of offences over a period of time and where the respondent's contracts were mainly on retail and commercial sites the Tribunal is satisfied that the respondent had substantial grounds for dismissing the claimant. However, in failing and refusing to speak to the claimant the Tribunal finds that the Managing Director acted unfairly. At the District Court hearing evidence was tendered in mitigation and a light penalty was imposed on the claimant. At the least, in cases such as this, an employee ought to be afforded the opportunity to put any mitigating

circumstances before the respondent for his consideration. In failing to afford the claimant such opportunity the Tribunal finds that the dismissal is procedurally unfair. The claimant contributed substantially to his dismissal. Having taken this contribution into account, the Tribunal unanimously awards the claimant the sum of €6,000.00, under the Unfair Dismissals Acts, 1977 to 2001.

Whilst stating in the letter of dismissal that payment in lieu of notice is normally not made in such cases, the respondent in acknowledgement of his service to the respondent gave the claimant two weeks' pay in lieu of notice. Accordingly, the Tribunal dismisses the claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

