

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
Employee

CASE NO.  
MN864/2007  
UD1114/2007  
WT375/2007

against  
Employer

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr T. Gill  
Dr. A. Clune

heard this claim at Ennis on 17th July 2008

Representation:  
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Claimant(s) :

Mr. Gearoid Howard, Crimmins & Company, Solicitors, Dolmen  
House, Shannon Town Centre, Co. Clare

Respondent(s) :

Ms. Lily O'Brien, VP Shields, Solicitors, 16 Briarhill Business Park,  
Ballybrit, Galway

The determination of the Tribunal was as follows:-

#### **Respondents Case**

The first witness gave evidence that he is a sales director for the respondent company. The company is a home automation company and is involved in the installation of audio visual equipment and home automation packages. The claimant commenced employment in August 2006 and was provided with specialised training courses as part of his employment. He was also provided with a company vehicle as his duties had to be carried out on sites away from the company premises and was provided with a mobile phone. He was given an employee handbook within a couple of weeks of his date of commencement and also received an employment contract. In October 2006 the witness became aware that the claimant was carrying out private work in direct

competition to his employer while working for the respondent in a hotel in Ennis. The claimant was given a verbal warning as a result of this incident.

The claimant was given a second verbal warning in May 2007 when the witness discovered that the claimant had approached their customers and carried out work for them on foot of training he had received from the respondent.

In October 2007 as a result of a tracking system which was installed on all company vehicles in November 2006 the claimants vehicle was tracked to a number of locations which placed him in areas where he should not have been during the course of his work. He was questioned about one particular address that the vehicle was tracked to and he denied that he was at that address. He was asked if he had anything more to say but he replied that he was in shock. The claimant was dismissed on this occasion for gross misconduct and his dismissal occurred on the 9<sup>th</sup> October 2007 as a result of the three incidents that had occurred.

A copy of an application to register a business with the Companies Registration Office under the name Perfect Plasma was shown to the Tribunal. One of the named applicants on this document was the claimant and the date of adoption of the business name was the 8<sup>th</sup> October 2007.

Under cross- examination the witness stated that the claimant was using the company vehicle and company tools outside of his work for the respondent. He could not specify the exact times that this work occurred. He agreed that the company vehicle could be used by the claimant for personal use as long as this policy is not abused. The fuel useage of the claimant was much higher than other employees.

In reply to questions from the Tribunal the witness confirmed that the claimant was not told that he could be accompanied to the meeting where he was dismissed. He was told that he could appeal the dismissal and that appeal would be heard by the operational manager who was in attendance when the claimant was dismissed.

The second witness was employed as an operational manager. He gave evidence of an incident involving stolen cable that the claimant only reported to him after it was brought to the claimants attention. He gave evidence that the fuel costs of the claimant were much higher than other engineers and that his mobile phone was being used excessively.

Under cross-examination he agreed that he did not inform the claimant of the purpose of the meeting on the 9<sup>th</sup> October 2007 when the claimant was dismissed. He confirmed that €250 had been deducted from the claimants wages for excessive use of the mobile phone.

The third witness hereinafter known as witness AL submitted a statement to the Tribunal stating that he had worked under the supervision of the claimant from August 2006 until October 2007 and had seen the claimant price and undercut clients from the respondents customer base. In reply to questioning he confirmed that he had only made the respondent aware of this two days before the date of the Tribunal hearing.

## **Claimants Case**

The claimant gave evidence that on commencing employment he was provided with a jeep and he was provided with a mobile phone. He used the vehicle for private use with the consent of the company. On one occasion in 2006 he was helping his brother in law to tune televisions at a hotel

in Ennis and parked the company vehicle at the hotel. It was outside of his working hours for the company and he did not perceive this to be a problem. The company spoke to him about this stating that he should hide the vehicle as it appeared as though he was working for the company at the hotel. He agreed with the company and did not view this as a warning.

In May 2007 he was fitting two televisions in a private house accompanied by another employee. When they had the work completed there was a difficulty with the televisions and he contacted four sub-contractors all of whom were unavailable. He returned to the house the following Sunday to fit an aerial to get the television working and parked the company vehicle outside the house. When he reported for work the next day he was told by the company that it was unacceptable to be working on Sundays using the company vehicle. He apologised for this and stated that the word warning was never used throughout this discussion.

On the 9th October 2007 the claimant was called to a meeting with his employer and was informed by the operations manager that his vehicle was tracked to a house in an estate in Limerick over a weekend where the respondents had been working. He denied that he had been in that estate over the weekend. He was informed during the course of that meeting that his employment was being terminated with immediate effect.

Under cross-examination the claimant denied that he had ever worked in competition with his employer. He did not get paid for work he did with his brother in law. He accepted that he was late for work on one or two occasions but was never warned about being late for work.

In reply to questions the claimant confirmed that he had been approached to carry out work for a lower price than the respondent but was not willing to do so as he was determined not to lose his job. Since his dismissal he has not been employed by another employer and has tried unsuccessfully on two occasions to secure employment. He has set up a partnership which is not in competition with the respondent.

## **Determination**

The Tribunal having carefully considered the evidence from both parties is satisfied that the procedures used by the company to effect the dismissal were defective in that a complete and thorough investigation of the Claimant's conduct was not carried out. The Tribunal is unanimously of the view that the claimant was not made fully aware of the gravity of the allegations against him and the consequences of these allegations for his continuous employment. The tribunal is of the view that the failure to inform the Claimant of the right to have a representative present at the meeting which resulted in his dismissal was a fundamental breach of fair procedures. In particular the Tribunal would refer to the statement of the witness AL and to the evidence that this witness did not make the respondent aware of the contents in his statement until two days before the hearing. At no time in his employment with the company did witness AL raise with the company any matters relating to the claimants alleged misconduct.

It is not unequivocally established to the Tribunals satisfaction that the incident in Limerick in October 2007 was the critical factor in leading to a decision to terminate the claimants employment and the Tribunal is satisfied that this incident was not put to the claimant at the time of his dismissal.

The Division would refer to a previous Determination in the case of *Gearon v Dunnes Stores Ltd*

UD 367/88 where it was held that fair procedures in effecting a dismissal had not been followed. The Tribunal then held

“The right to defend herself and have her arguments listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or this Tribunal... the right is a fundamental one under natural and constitutional justice, it is not open to the Tribunal to forgive its breach”.

The Tribunal is of the view that no clear evidence exists that the claimant made any serious efforts to mitigate his loss but finds that the claimant was unfairly dismissed and awards the claimant €3000 under the Unfair Dismissal Acts 1977 to 2001. The Tribunal awards the claimant a further €1600 being the equivalent of two weeks wages under the Minimum Notice and Terms of Employment Acts 1973 to 2001. The claim under the Organisation of Working Time Act fails due to lack of evidence.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

