

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO. UD507/2008
MN468/2008
WT296/2008

against
Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M O'Connell BL

Members: Mr R Prole
Ms K Garvey

heard this claim at Dublin on 16th July 2008

Representation:

Claimant: Mr Neil Cosgrave, Alan Donnelly & Co, Solicitors
Chancery House, Railway Street, Navan Co. Meath

Respondent: Mr Pat Gleeson, Gleeson & Associates, Solicitors
The Standhouse, Ratoath, Co. Meath

The determination of the Tribunal was as follows:

Claimant's Case:

The claimant commenced his employment with the respondent company in April 2006 as a truck driver. At the Christmas party in 2007 his Managing Director (MD) told him that he would like him to become yard manager and he was promoted to that position in February 2008. The claimant denied that he had pestered MD for the role. He earned more money and had fewer hours in his new role. No issues were raised with the claimant regarding his performance and he had only received positive comments. There was no mention of a trial period in the new role nor did the claimant receive a new contract of employment, only a list of responsibilities.

At the end of the day on 21st April 2008 the claimant was approached by the General Manager (GM) who told him that a new yard manager (a previous yard manager with the company) was coming in the next day and that the claimant was to resume driving a truck. The claimant came to work the following day and opened the yard. When the new yard manager came in the claimant went home sick. He rang MD and asked him to reconsider, but he wouldn't. When the claimant met MD and GM on the 23rd April he was given the choice of going back to truck

driving or a redundancy payment of five thousand three hundred euro, but it was put to him to take the money. A colleague collected company keys and a mobile phone from the claimant's house, even though his were not the only keys to the premises. The claimant believed that he had been dismissed.

The claimant contested that he was informed that the change in role would be temporary and that he could resume working in the yard when the business got busier. He wasn't told that he could keep his current salary and receive overtime payments when resuming driving trucks, but was told that he would go back to receiving €16.00 per hour. The claimant denied that he requested specific sums of money from MD, but did tell him that it was an unfair dismissal, and that he had received legal advice on the sum. The claimant did not accept that the job was always open to him.

Respondent's Case:

Giving evidence for the respondent company MD stated that all new positions were subject to a three-month trial period, although this wasn't given in writing to the claimant. MD heard after the Christmas party that the claimant was interested in the yard manager position, but did not suggest the position to him. Due to a slow down in business and staff changes the position of yard manager came up in February and the position was given to the claimant. MD rounded up the claimant's salary, including overtime, to decide his new salary.

While he was good at running the yard, the claimant did not possess good computer skills. The claimant was given two-weeks training on the company computer system and after that he could call GM. In evidence GM said that he found that the amount of times he had to assist the claimant was impacting on his own work and he had mentioned this to MD. However, none of these concerns were raised with the claimant.

GM gave evidence that on Friday 18th April 2008 MD told GM that he wasn't happy with the claimant's work and that he was considering replacing him. GM told him that a previous yard manager was back from abroad and was looking for work. MD decided to take him back as he didn't require training, and, as he needed another truck driver, he decided that the claimant could resume driving, keep his current salary and be able to earn overtime. GM and MD discussed the matter further the following Monday, but didn't consider it necessary to consult the claimant. MD instructed GM to inform the claimant. When GM told the claimant that he would be resuming driving a truck the claimant said he was leaving. MD told GM to get it in writing, but when GM spoke to the claimant the following day he said he wasn't leaving and that he was the yard manager. GM spoke to the new yard manager who went to speak with the claimant who then left the premises on sick leave. GM had not informed the claimant that he would receive overtime payments if he resumed driving.

MD offered a redundancy payment as the claimant didn't wish to resume driving trucks, but he didn't suggest that the claimant should take the money. MD needed a good driver and was just reorganising. If business got busier the claimant could have a dual role in the yard and driving. MD sought the keys and phone back from the claimant as, he believed, there were only four sets of keys to the business, the phone was the main number for customers to make orders to the yard, and he didn't know what state of mind the claimant was in. The claimant phoned MD on three consecutive days and told him that his case was worth €60k, then the following day €30k, and then €15k. MD then received a letter from the claimant's solicitor on 28th April 2008.

Determination:

The Tribunal heard contradicting evidence regarding a number of issues including; the existence of a probationary period in the claimant's contract of employment in relation to his promotion to Yard Manager, the opportunity to earn more money if he returned to his previous position as a truck driver, and the possibility of resuming a role as yard manager at some time in the future.

On the respondent's own evidence, the change in status of the claimant's employment amounted to a demotion. The Tribunal appreciates that the respondent was a small company operating in tough economic circumstances. Very often, improvisations are required at short notice in order to secure the economic viability of a company. However, in this situation the change was enforced despite the fact that the claimant was regarded by the Managing Director (MD) of the respondent company as a good employee. The only criticisms raised related to his handling of the company's computer system. This concern was not properly brought to the attention of the claimant. MD decided to demote the claimant without regard to the necessity to be fair. In these circumstances, it was not unreasonable for the claimant to refuse to return to his previous position as a truck driver.

Accordingly, the Tribunal believes that the treatment of the claimant amounted to an unfair dismissal, and therefore, the claim under the Unfair Dismissals Acts, 1977 To 2001, succeeds. The Tribunal awards the claimant €17,500.00 (seventeen thousand five hundred euro) under that act.

As this was a case of constructive dismissal the claimant was not entitled to minimum notice, and therefore, the Tribunal finds that the claim under the Minimum Notice And Terms Of Employment Acts, 1973 To 2001, fails.

As no evidence was adduced by the claimant regarding holiday pay, no award is being made under the Organisation Of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)