

Correcting Order

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
Employee UD412/2008
against MN366/2008
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 B. Garvey BL

Members: Mr. C. Ormond
Mr. J. Dorney

heard this claim at Dublin on 2nd October 2008

Representation:

Claimant(s): Ms. Caitriona Craddock BL instructed by Ms. Avril Gallagher, Gallagher &
Company, Solicitors, 58 Ranelagh Village, Ranelagh, Dublin 6

Respondent(s): Mr. John Barry, Management Support Services (Ireland) Limited, The Courtyard,
Hill Street, Dublin 1

Determination

This order corrects the original order dated 10 October 2008 and should be read in conjunction with that order:

The determination of the Tribunal is as follows:-

It was acknowledged during the hearing that the claimant was paid his statutory entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The sum awarded therefore should have been excluded from this amount.

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This _____

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(CHAIRMAN)

the role of supervisor for a time, he did the job but he did not seem to like the fact that he had to give instruction to other employees and he did not want to be responsible for employees work. This was two years ago. The general manager advised the proprietor of the decision to appoint the claimant to a supervisory position. The claimant worked on his own from 8a.m. until 9a.m. The general manager left on 16 April 2008 and he was concerned.

The proprietor's son told him that MG was planning to open a business and the claimant was going to work with him. He had information that the claimant was taking money for tracking cars. A car was placed on a ramp to ensure it was aligned, this was not included in the price of the tyres and it was not a logged transaction. It was not possible for an employee to take money while tracking was being completed. The proprietor was very shocked and concerned and he had to think about how this matter could be handled. Before lunch the claimant was in the office in the garage and one or two staff were nearby. He asked the claimant if he was going into business with MG and the claimant looked startled. After lunch the claimant told the proprietor that he did not like the way he spoke to him. The claimant was upset and annoyed and he sounded angry. He told the claimant that he did not mind him being upset, as he the proprietor was upset. He told the claimant that he heard that he was taking money for the tracking and the claimant replied that he knew he should not have done that. The proprietor became very annoyed, he raised his voice and he told the claimant that this was a second offence and a heated exchange ensued. The claimant apologised and the proprietor told him to leave the premises and come back the next day, which was Friday, as he wanted to calm down and think about the matter. The claimant did not report for work on Friday and he then received a letter from the claimant's solicitor informing him that the claimant was taking a case against him. He did not receive a response to a letter dated 22 April addressed to the claimant's solicitor in which he stated that the claimant was dismissed for gross misconduct. He sent a letter to the claimant on 18 March 2008, which was inadvertently dated 22 April 2008.

The proprietor who was recalled to give further evidence told the Tribunal that he did not invite the claimant to his office and that the claimant came to his office. He asked the claimant to return to work the next day and he wanted to calm down. He told the claimant in the morning that he was taking money and he was of the understanding that this was occurring for some time. He was in work at 11 am on 17 April 2008. He had a very good relationship with his son.

In cross-examination the proprietor stated that the claimant reported directly to MG. He was aware from another member of staff that the claimant had a disagreement with a tenant in the building. The claimant was promoted to a position of supervisor for three to four months in 2007. The claimant opened the premises at 8a.m. and the claimant was the only person there until 9a.m. Asked if he had a disagreement with the claimant he replied there was no discussion and the claimant walked out. Asked if he was under pressure prior to this he replied that planning permission for his premises was refused three times and he was requested to submit another application. Prior to the general manager leaving he was stressed. He agreed that it was not fair of him to ask the claimant in front of his colleagues if he was going into business with MG. Asked if he accused the claimant of taking money for the tracking of cars he replied he that he told the claimant that he had some cheek talking to him when he was talking money for the tracking of cars. The proprietor did not call the gardai.

In answer to questions from the Tribunal asked if he was going to close the business if planning permission was granted he replied he did not know what he was going to do. Asked if on 17 April 2008 he and the claimant spoke about events he replied yes. Asked if the issue was about the alleged taking of money he replied that the claimant gave out to him for what he said to him and the proprietor lost his temper. Apart from this the claimant's conduct was beyond repair.

Claimant's Case

The claimant told the Tribunal that he commenced employment with the respondent on 6 January 2002. His employment ended in April 2008. He reported for work on Thursday at 8a.m. and opened the garage, as there were cars for tracking. Customers did not have time to have the tyres realigned and they returned later by appointment and were not charged. At 9a.m. the proprietor arrived at the garage and in front of his colleagues the proprietor asked him about the general manager MG. Someone told the proprietor that the claimant and MG met each other outside of working hours. He told the proprietor that he met MG in the gym the previous night. The proprietor told the claimant that MG was going to open his own business and that the claimant would be the supervisor. That was not true and he told the proprietor that this was untrue. The proprietor told him that he was unhappy with his job and he started to shout at him. The claimant became upset and he left the office and collected his clothes from the garage. He came back and asked the proprietor if he could get his P45 and a cheque. The proprietor told the claimant he would send it in the post. The proprietor did not manage the business and MG, the general manager checked the claimant's work. After the proprietor spoke to him he felt upset, he told the proprietor that he wanted to remain at the garage but the proprietor did not let him remain. When the proprietor called him to the office he said that he wanted to discuss MG and he was upset. The claimant found alternative work on 3 May 2008 as a cleaner in a restaurant and he now earns €365.00 per week. It was not true that he took money for the tracking of a car.

In cross-examination he stated that he reported to MG, the general manager. Asked if the general manager had reason to talk to him about problems that he had he replied that the general manager told him which car he should work on. He was given a letter on 20 March 2006 and he stated that due to language difficulties that he got annoyed. After he received this letter he was promoted to a senior fitter and given the opportunity to be a supervisor. He told the general manager and the proprietor that he could not do it due to difficulty with language. He has been living in Ireland for eight years and prior to commencing work with the respondent he worked in a meat company and did not need to speak English. The proprietor was upset on 17 April 2008 as the general manager MG had left. The proprietor told him that he heard that he was going to work with MG. He could not understand why the proprietor said that he would be leaving. The claimant did not want to leave and he was happy working with the respondent. The claimant was summoned to the proprietor's office and no reason was given and the claimant was surprised. The proprietor told him he was sacked and the proprietor did not mention gross misconduct. He received a letter dated 22 April 2008 and he did not know what he did wrong. Asked if taking money was equivalent to gross misconduct he replied yes.

Asked why he did not go back to the proprietor he replied that the proprietor was bad to him the day that he sacked him. Asked if he admitted to the proprietor that he had done something and the accusation was that he had taken money he replied no. He was absolutely sure that the proprietor did not mention anything to him about coming in to work the next day. After his employment ended he applied for a job with a cleaning company and he obtained employment. Asked if he applied for jobs in garages he replied he needed to get a job as soon as possible. He now works four days a week, ten hours a day.

In answer to questions from the Tribunal he stated that customers bought the tyres and paid for them and they then returned to have tyres aligned another day by appointment. Asked if he ever had customers who came for tracking who had not bought tyres he replied that he was not allowed to take customers for tracking and he had to go to the general manager. The tracking was done

another time and the customer paid in the office. Asked if the proprietor stated that he kept money for himself he replied he was employed four years with the respondent, many times he received payment but he never took money for himself. The appointment for tracking was usually made by managers and never by the tyre fitters. The proprietor's son was an employee and he worked with him. He stated that the proprietor did not mention stealing money in the afternoon. He heard about stealing money when his solicitor received a letter from the respondent. He did not know what the proprietor meant by gross misconduct. His solicitor told him that he was accused of taking money. Asked if he kept in touch with MG he replied that he met him at the gym and he did not meet him every day.

MG a witness on behalf of the claimant told the Tribunal that he signed a letter dated 20 March 2006, which was addressed to the claimant. There was a problem with the claimant and a customer; the customer was abusive to the claimant. The respondent could not order a set of tyres without getting advance payment. A customer refused to pay and this had nothing to do with the claimant. He worked with the respondent for twenty-five years and he is still an employee. He is at present absent on sick leave. In April 2007 all staff were given a general document. The respondent was in direct competition with a company nearby. The respondent presently has five staff and twelve years ago it had two. He never had an issue with the claimant. It took forty-five minutes to track a car and customers purchased tyres by appointment. The claimant opened the premises at 8a.m. and he did alignment for customers by appointment. This was paid for in advance. Ninety five per cent of customers paid by Visa or credit card and very few paid by cash. The respondent did not do wheel adjustments when customers bought tyres. The proprietor said that he had evidence that the claimant had taken money and that is all he had heard; there was CCTV on the premises. The claimant had contributed to the company ten fold.

In cross examination asked if to his knowledge the claimant had ever taken money he replied that he was fairly certain that he had not. The claimant was a trusted employee. Asked if he was there on Thursday he replied no. Asked if he came to the office a couple of months after the claimant was dismissed he replied that he came in to collect furniture. He said he was not happy about the way the claimant was treated. Asked if the claimant asked for his wages early he replied that had nothing to do with discipline. Asked if he confirmed that wages were issued he replied that he signed for these.

Determination

The evidence of gross misconduct was unconvincing and unsupported. The claim for unfair dismissal succeeds and the Tribunal awards the claimant compensation of €5,000 under the Unfair Dismissals Acts 1977 to 2001. The claimant did not receive minimum notice so he is therefore entitled to two weeks minimum notice in the amount of €969.22 which is equivalent to two weeks gross pay (€484.61 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

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(CHAIRMAN)

