EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
Employee	RP299/2008 UD363/2008 MN325/2008 WT166/2008
Against	
Employer	

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr M. Kennedy
Ms. P. Ni Sheaghdha

heard this claim at Dublin on 25th July 2008

Representation:

Claimant(s): Mr. Stephen O Sullivan BL instructed by Richard McGuinness & Co., Solicitors, 24 Sundrive Road, Dublin 12

Respondent(s): Mr. Rody Horan SC instructed by Mr Barry Collins, Barry Collins & Company, Solicitors, Greenside House, Cuffe Street, Dublin 2

The determination of the Tribunal was as follows:-

Background

Counsel for the respondent outlined that he has to meet a claim for unfair dismissal and minimum notice and not a redundancy claim. He had no information regarding the Organisation of Working Time Act. His client (the respondent) had nine cement trucks and had a contract with Roadstone. The claimant was employed to deliver concrete. His client owned the fleet and the pick up point was the Roadstone depot. The claimant's function was to pick up concrete and deliver it to clients of Roadstone. Roadstone handled all documents and if the claimant delivered a load he would get the delivery docket signed and it was straightforward. On 19 October 2007 the claimant was

assigned by Roadstone to undertake a delivery to the city centre. The claimant was observed driving in the opposite direction at 5p.m. and he had driven past the Roadstone entrance. The respondent telephoned Roadstone and then telephoned the claimant. The respondent TG asked the claimant why he was driving out of town and the claimant denied that he was on the Naas road. The claimant had some residue in the truck and he was going to drop it off at a friend's house. His client directed that the claimant return immediately to Belgard. The procedure that was in place was that residue that was returned to Roadstone was recycled. Cement was a very complicated product and it varied in consistency. If a wrong product was sent to a customer Roadstone would be liable for it. The claimant returned to the depot and TG met him at 6p.m. and had a short conversation with him. The claimant was adamant that he was doing a favour for a friend and explained that Roadstone told him that he could have the concrete. TG found this explanation extraordinary and the claimant could not do what he did. TG dismissed him at the Roadstone premises. The claimant admitted what he did was completely forbidden and the claimant's behaviour was a threat to the respondent's enterprise. If TG did not take the action that he did the contract with Roadstone would be discontinued. The claimant lied when he was initially confronted and he then admitted that he was delivering to a friend in the Coombe area. The claimant was guilty of gross subordination and dishonesty.

After the claimant was dismissed he told TG that he was going to drive a taxi; he sought a reference from the respondent, which was declined, as it was a serious situation and he had put the enterprise in jeopardy. Concrete has a very short limited lifespan and survived two hours maximum. When water was added to the concrete it affected the chemical component and the claimant's friend got a substandard product.

Counsel for the claimant outlined to the Tribunal that the case is about misconduct and no letter of dismissal was given to the claimant. The alleged misconduct took place on 19 October 2007. The claimant had a delivery docket. The claimant undertook a delivery to a client and delivered the remainder to a friend and he denied that this constituted misconduct. That was the custom and practice that was in place. The claimant made three deliveries to the respondent's house. If the case is one of an allegation of misconduct no fair procedures applied.

Respondent's Case

The employer TG told the Tribunal that he had nine delivery trucks, which were used for delivery of concrete and he dealt exclusively with Roadstone. His operation was confined to the Leinster area. He supplied the trucks and drivers and paid the drivers. The claimant delivered concrete to customers. If a full load was not delivered the procedure in place was that it should be returned to Roadstone and it was recycled. If the concrete was of a particular mix it had to be returned as it was likely to be beyond its lifespan, could not be guaranteed product and may be unsuitable for further use. Roadstone had to be made aware of the quantity that was left over and it then decided if it could be used for a job, which required concrete of a lesser strength. To his knowledge the claimant was aware of this practice. On 19 October 2007 at 5pm. he left his house and as he was going in the Naas direction he observed a Roadstone truck. He telephoned the claimant and asked him where he was; he told him he was leaving Maryland after undertaking a delivery. He told the claimant that he had been observed on the Naas Road. The claimant initially told TG that he was on his way out of town and he then admitted that he was on the Naas Road and going to drop off concrete to a friend. TG told him to return to Belgard and the claimant agreed to this. He told the claimant that there was a problem; he knew the claimant had a delivery for that direction and he had driven past the Roadstone depot. The claimant's truck was loaded at 2.10p.m. on 19 October and the claimant should have gone to the recycling yard. The procedure in place if concrete was left

over was the office was contacted and if it were needed for a job it would be used and if not it had to be recycled. The docket for this load was never furnished He had dockets for the other deliveries which were undertaken on 19 October.

He met the claimant at Roadstone Belgard about 6p.m. The claimant should have returned the concrete that was left over, the claimant made light of it and he said he was delivering the concrete for a friend. The claimant was definitely aware of the procedures. He told the claimant that he would not be allowed to work for him or Roadstone again. The claimant asked him if he could report for work the next day and TG refused. The claimant was of the view that it was a trivial mistake. If it were the case that any employee did what the claimant did they would have been dismissed. TG stated that it was possible that three deliveries were made to his home, it was all done through the office and a record was retained in the office. The claimant looked for a reference and a P45. He told him that he could not give him a reference due to what happened. The claimant told him he did not tell his wife what had happened. If he condoned the claimant's behaviour Roadstone would have discontinued the contract. He received some telephone calls from employers seeking a reference for the claimant. In a social welfare form for the claimant he documented that there was a shortage of work, as he did not want to bad mouth the claimant. The claimant was a good employee. Roadstsone was made aware of the incident. He relayed that on two occasions when the claimant had to attend relatives' funerals he allowed him time off with pay and the claimant owed TG a week's pay.

In cross-examination he stated that at 5p.m. on 19 October he spoke to the claimant on the telephone. Asked if the claimant had already made the delivery to his friend he replied that he did not know where the claimant went and the claimant told him he was going to deliver concrete to a friend's house. He told him not to deliver the concrete to his friend but to go back to the yard. Asked if he told the claimant he would not be allowed work for him again he replied yes that he made the decision and all dockets were on the clipboard apart from one. The claimant did not have a contract of employment and payslips were given if requested. He did not have disciplinary procedures in place. He could not have the claimant work for him due to what had occurred and it was a very serious offence. He said that he definitely did not tell the claimant when he started that he could do what he wanted with leftover concrete. A replacement driver started on the following Tuesday. Asked if he had hired a replacement before Friday he replied definitely not. Asked if the claimant delivered four deliveries to his premises and that he had no dockets for these deliveries he replied he had dockets. Asked if he made the decision to dismiss the claimant before meeting him in the yard he replied what the claimant did was a very serious office. Asked if by the evening he had made the decision to dismiss he replied that by evening the claimant's attitude had changed. Initially the claimant was very aggressive about the matter but when he realised that it was serious he changed. Asked if he did not put the allegations in writing and that the claimant was not given the opportunity to obtain representation he replied that is what he did. The claimant said that he felt bad about the incident. Asked why he did not give the claimant a warning he replied that it was a very serious offence.

In re-examination asked if the claimant's attitude changed in the yard he replied that the claimant was very surprised and when he returned he was more composed. The claimant was of the opinion it was a simple matter and that it was only a bit of concrete and he did not say that this was done all the time. Roadstone was happy with the way TG dealt with the situation.

In further cross examination asked if the claimant received €75 cash for working on Saturday he replied it was a cheque and any overtime or extra hours was paid by cheque and the claimant worked some Saturdays. Asked if the claimant was paid €10 an hour in cash he replied

it all wentthrough the system.

In answer to questions from the Tribunal asking what kind of interview he had with the claimant he replied that he met the claimant in the yard in Belgard and he was an experienced concrete driver. Two weeks after interview they had a discussion about work and he told the claimant that he was happy enough with him. He told the claimant that Roadstone had a very strict policy on all products returned to the yard. He did not have a company booklet.

The transport manager with Roadstone Mr. A told the Tribunal that the policy in Roadstone was if there was concrete remaining after a delivery it must be returned to the depot. It was then decided if it could be reused or recycled. It could be reused as a fill product. Concrete has a shelf life of two hours and after two hours water must be added or else the concrete congealed and is very hard to work. It was usual that in one in every six loads of concrete residue was returned. This was recycled and some projects ordered a little more concrete. If a client ordered ten and used seven the client was charged for ten and Roadstone disposed of the remainder He undertook an investigation into the claimant and he found out that the claimant had a loaded truck. He checked with the customer that the load was delivered. A delivery docket was not scanned on the system and proof of delivery has not been done to date. A further consignment of concrete had not been returned. As the concrete was in the truck from 2.15p.m. to 5.15p.m. it would have necessitated the addition of water to destrengthen it and Roadstone had a quality policy He never heard of the claimant's friend. A colleague of the claimant BR resigned under pressure and he was an employee of Roadstone.

In cross-examination he stated he spoke to the claimant the Tuesday after the incident and the claimant asked him if he had any work. Asked if there were no criminal complaints against BR he replied no. BR was given the option to resign or to go to a formal investigation.

Claimant's Case

BR told the Tribunal that he worked for CRH If there was any concrete left over he would do a favour. TG asked him if he could deliver product to his cousin and he could not recall the dates. He left CRH six weeks ago. He then said it was about 2007 that he undertook three to four deliveries to TG's cousin. He had a machine to print dockets, he never printed dockets and he thought he was doing TG a favour. He delivered to a house and he could not recall the location. He started work at 6.30a.m. and finished at 2p.m. When a new driver was taken on they would accompany a driver for two to three days and be shown what to do.

In cross-examination he stated he worked in Roadstone for twelve years. He agreed if he had a surplus that it had to be returned and he did that most of the time. Asked if he made illegal deliveries and that he was found out he replied he did not admit any of this. Asked if he was confronted about doing something that he was not permitted to do and he resigned he replied yes he resigned. Asked if he left due to allegations that were made against him he replied the respondent wanted to take holidays from him. Asked why he did not tell TG that he could not do this he replied because it did happen. Asked if TG could provide dockets he replied he could not as he had dockets in the lorry and he had never printed the documents. He knew that he was going to be giving evidence in the case some months ago and he discussed it with the claimant. Asked if he told the clamant that he knew about an illicit delivery he replied no.

The claimant told the Tribunal he commenced employment in September 2003 as a truck driver with the respondent. His hours of work were 7a.m. to 4.30p.m./5p.m. and he finished at 7p.m.

most evenings. At the time he was dismissed he had not received payslips and he did not have a contract of employment. On 19 October 2007 he received a call from TG who asked him were he was. The claimant told TG he was at a friend's house. TG told the claimant that he had been observed on the Naas Road. The claimant was informed that he was going to be suspended for a month. He asked TG what was wrong and he told him that the matter was very serious. He told TG that no one ever said this to him before. When the claimant commenced employment TG told him if he had concrete left over he could do what he liked with it.

He told the truth after a discussion with TG. TG told him he was letting him go and putting the truck in Auto Trader. TG told him that he would meet a manager and would let him know if he had a job. He did not know if there was a meeting on Monday. TG then told him that he was dismissed and that was it. TG undertook extensions in his house in late 2006 and he telephoned the claimant and told him that if he had concrete left over that he was to contact him and bring it to his house He undertook three deliveries to TG's residence and he did not have dockets for this. He spoke to the transport manager on Tuesday and he asked him if he had any work. He received his P45, which reflected his pay up to the day of his dismissal. He worked two to three Saturdays a month and a cheque was made out to cash for this. He received €10 per hour for overtime after 6p.m.

Since he was dismissed he endeavoured to gain alternative employment. He telephoned a friend and has been working with him since January. He telephoned several haulage companies and went to different agencies; he obtained employment nine weeks later. He was never given the allegations that were made against him and the respondent did not have a disciplinary procedure in place.

In cross-examination he stated that he previously worked with CPI, which was a very large and reputable company. Asked if CPI let he go he replied that he resigned. Asked if CPI alleged that he dropped off loads to friends and let him go he replied he resigned.

Asked how could TG tell him that he could do what he liked with product that was left over he replied that TG did say that. Asked that the matter was raised at the hearing to embarrass his client and it was common case that on 19 October 2007 that the claimant never said to TG that he had dropped illicit loads at his own house he replied that he did say to TG he had no problem doing this for him. He first went to a solicitor some months ago. Asked why the Tribunal was only hearing about it for the first time he replied he had no answer. Asked who PG was he replied a friend of his. Asked when did PG contact him he replied 4pm. or 4.30p.m. and PG said to the claimant if he was on his way back to the job that he needed a half metre of concrete. Asked if he did not mention PG to TG he replied he told TG he was dropping off concrete to a friend. PG did not pay him and he did not think that there was any risk in doing this. Asked why he passed the Roadstone entrance he replied he was finished at 4.30p.m. and he delivered cement to a friend. Asked if he could not possibly have driven from Maryland to the Naas Road in fifteen minutes he replied it took him twenty-five minutes.

Asked that he delivered concrete to TG's house without documents was fiction he replied absolutely not. Asked if all payslips and overtime on Saturday were put through the system he replied he never received payslips. Asked if he ever requested a payslip he replied no and he never saw a payslip. He felt unwell for some time after his dismissal. He does not earn overtime in his current job.

Determination

The Tribunal is satisfied that the respondent did not have a disciplinary procedure in place. Nor had the claimant been furnished with a written contract of employment, which might have spelt out what constituted misconduct and, in particular, gross misconduct. The Tribunal is satisfied that the claimant did deliver concrete to a friend. The Tribunal is also satisfied that, after the claimant had driven beyond the depot, his employer telephoned him and told him to return to the depot. The claimant did not do this and instead continued to make the unapproved delivery. However, the Tribunal is not satisfied that the respondent had ever made it clear to the claimant that making deliveries of this nature could amount to gross misconduct and lead to summary dismissal. This, of course, could easily have been done in a disciplinary procedure or a written contract of employment. The Tribunal is, therefore, satisfied that the claimant was unfairly dismissed. However, the Tribunal is also satisfied that the claimant significantly contributed to his dismissal in choosing to ignore his employer's direction. In the circumstances, pursuant to his claim under the Unfair Dismissals Acts, 1977 to 2001, the Tribunal awards to the claimant compensation in the amount of €1,000.00 as being just and equitable.

In respect of the claim made under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, the Tribunal is satisfied that the claimant is entitled to two weeks' notice and in this regard awards him compensation in the amount of €1,340.00.

In respect of the claim made under the Organisation of Working Time Act, 1997, the Tribunal is not satisfied that there was any breach of this Act by the respondent and accordingly dismisses this claim.

As the Redundancy Payments Acts, 1967 to 2003 and the Unfair Dismissals Acts are mutually exclusive and as the Tribunal has made an award under the Unfair Dismissals Acts, the claim under the Redundancy Payments Acts fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)