

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

RP1007/2008
UD1173/2008
WT479/2008

Against

Employer

Under

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: Ms. M. Levey BL

Members: Mr. J. Reid
Ms M. Mulcahy

heard this claim at Dublin on 9th February 2009

Representation:

Claimant(s): Mr. Brian Conroy BL instructed by Ms Joanne McInerney, Able Solicitors,
72 Tyrconnell Road, Inchicore, Dublin 8

Respondent(s): Ms Muireann McEnery, Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:-

Respondent's Case

The operations manager PM told the Tribunal that he was responsible for managing the day to day running of the business. The claimant delivered and collected freight. The respondent delivered product daily to approximately two hundred and ten to two hundred and twenty customers. The claimant was employed as a helper on a cigarette van. The respondent undertook fifty to sixty deliveries a day. There were two types of deliveries, domestic freight and dedicated cigarette delivery. The cigarette delivery van was different than the normal freight van. Due to the type of product, security was paramount. The customer required that the respondent had a two-man van for safety/security. On average freight drivers worked from 7a.m. to 5.30p.m. Drivers of the cigarette vans loaded the vans at 5.30a.m./6.00a.m. and were on the road at 6.30a.m/6.45a.m and they pre planned the route the previous day. The freight drivers pre determined their own delivery

times and if they wanted to work through the day that was their decision. If undelivered product was returned to the respondent the product was downloaded to a scanner. The helper was rarely involved in debriefing after product was returned. The helper on the van on occasion left the van after the delivery was completed and went home or returned to the depot to collect his car and then went home. There was a clock in system in place whereby employees placed their fingers on a pad. It was not a requirement that employees clocked out as helpers on vans may not return to the depot. The respondent encouraged employees to take breaks and it was a matter for them to take breaks while on the road.

In January 2008 the respondent decided to employ self-employed contractors and it encouraged employees to become self-employed contractors. He had several conversations with the claimant from January to May 2008 regarding self-employed contractors. In April 2008 a self-employed contractor was employed to cover the west city route and this was the route that the claimant previously covered. The claimant did not have a full licence but the respondent would help the claimant to obtain the vehicle and it gave him the option to use the respondent insurance. The self-employed drivers eliminated the cost of vehicles, insurance, repair and absenteeism as self employed drivers were not paid by the respondent.

In mid July 2008 the respondent focused on redundancies and it had to evaluate all routes and it had surplus staff. In determining employees for redundancy the criteria used was length of service, late attendance, versatility and quality of work. On the 21 July 2008 employees were given notice of proposed redundancies. On the 22 July 2008 the respondent met with drivers and employees were told that a matrix system would be used to evaluate all employees. Three to four employees took voluntary redundancy. The claimant was reliable and was good at his job. He gave the claimant a contract of employment, which he signed. The claimant could have taken the contract to read and the claimant did not raise a grievance at the time. The claimant was not forced to sign a contract and the respondent had employees who had not signed a contract. A new clock in system was installed on 24 December 2007.

Fifty-five drivers were employed and there was always a driver looking for a wage review, which was a ten second chat and no formal approach was made. Employees did not get a wage review. During the Christmas period some of the helpers returned to work with the respondent on a temporary basis. The claimant would have been considered for this if the situation in the respondent had been different. The respondent paid drivers for hours worked and if employees worked on Saturdays they were paid time and a half.

In cross-examination he stated that the respondent encouraged drivers to vary their routes. The claimant worked with DG until the second week in August and DG is now employed as a self-employed driver. On occasion DG had a helper. The respondent had four helpers on vans and all helpers were employees. He met the claimant once or twice a week and he did not have any difficulty with the claimant who knew his route very well. The claimant received a score of 0 for his route knowledge as he was not flexible regarding routes and was a one-route man. The claimant was co-operative on the west city route. The claimant would reluctantly work on any other route and once he was off the west city route he put up barriers. When he evaluated the claimant's routes he evaluated him for six routes rather than one route.

The respondent employed people who were recommended and it did not advertise. He then stated that the respondent advertised for warehouse operatives with the respondent. Between January 30 and April it encouraged the claimant to become a self employed contractor. The claimant told him

in April he was not going to take up this offer and the respondent was not in a position to give him a job at the time. When drivers were on the road it was important for them to take breaks. The claimant continued to work forty-eight hours a week. If the claimant worked a sixty-hour week he was paid for forty-eight hours. The respondent has lost some contracts, the nature of the freight has changed and the volume of freight has decreased.

PW the second named witness for the respondent told the Tribunal that he was financial controller and was responsible for the day-to-day management of accounts and debtors. He commenced employment with the respondent in January 2002. In 2006 the respondent made a small profit, in 2007 it made a profit and 2008 profit margins were way down for the first four months and a decision was made to turn the company around. Some customers sought a price decrease and the respondent had to introduce voluntary redundancies and then compulsory redundancies. The respondent incurred costs in running its business with insurance of vans. The best policy was to employ self-employed contractors. The respondent reduced costs in other departments as well.

COB the operations manager in the respondent's warehouse told the Tribunal he was involved in the day-to-day operation of the respondent. He met the drivers in the morning. If drivers did not report for work they texted him. He did not have a problem with the claimant; the respondent's busiest time was in the morning for four to five hours. The claimant never raised issues with him and he was not involved in issuing a contract of employment to the claimant.

In cross-examination he stated that all employees had their own bay in the warehouse. The claimant was seldom asked to change to a different route. He never threatened the claimant. The claimant worked on a set route and he was good at his job. The claimant never made many complaints and he could not recall if the claimant complained about a colleague smoking. He never verbally abused the claimant and he stated that he had heated discussions with drivers. The claimant always returned to the depot after he had completed his delivery, as he had to collect his car.

Claimant's Case

The claimant outlined to the Tribunal details of his education and extensive employment prior to commencing employment with the respondent on 3 October 2005. He first commenced as a helper to driver GM and the claimant trained him on his route. He then trained PC and when he left he then worked with KB. He was told that he would receive a pay increase, his workload increased and he had more shops/newsagents on his route. He went to all his managers and the MD was not always available. He received a call that he had a new contract of employment. He asked could he take his contract home and he was refused and PM told him he had to sign the contract. The claimant complained about his conditions and he reported for work at 5a.m. He was told he was a whinger and there was no one he could turn to. He asked for a pay increase and he telephoned COB for DK's telephone number, which COB gave to him. Due to the number of deliveries it was impossible not to return product and he was reprimanded for this. He did not complain about undertaking deliveries on other routes and he complained if he was asked to train in a new person. In March 2008 he was told that he was rocking the boat if he made a complaint about a colleague who was smoking. COB told him that his job was okay. The claimant was informed that his routes were going to change and the claimant was not given information on this.

Eight weeks before he was let go he was summoned to a meeting and given a letter that due to the economic downturn he would be selected for redundancy. The claimant knew his route and he was not told about the selection criteria. He could not understand why he was selected. After he was made redundant he endeavoured to seek employment. He did not receive his P45 the same time as

his colleagues. He is still seeking employment and endeavouring to complete some courses.

In cross-examination he accepted that there was a downturn in the business. His manager never encouraged him to take breaks. He did not ask for a contract but he was given one. He did not have the money to provide a car to become a self-employed driver with the respondent and he did not understand what he was getting into and the opportunity to rent was not offered to him. In 2007 he obtained a full drivers licence. As he had changed address his P45 was sent to the incorrect address. The claimant did not document his grievances in writing, as he did not think that this was a good idea. His cigarette route was never split with freight.

In answer to questions from the Tribunal he stated that he was informed that there was an opportunity for him to be a self employed contractor and he did not know that he could use the respondent's insurance. No one informed him that he could rent a van; he was informed about VAT and PPS. When he enquired about a van his colleagues told him that he had to provide his own van and he felt that information was not given to him in relation to becoming a self employed contractor.

KR on behalf of the claimant told the Tribunal that in mid September 2005 he commenced employment as a helper with the respondent. He was told by PM the operations manager to sign a contract and he did not have the option of taking it home to read it. He had a disagreement with COB every two to three weeks. He told COB that he wanted to leave and his received a wage increase. He was offered a redundancy package, which he accepted. In December he received a telephone call from COB that there was part time work available and he agreed to take it.

In cross-examination he stated he accepted a voluntary redundancy package. His wages increased from €450 to €500 at the beginning of 2008. When asked if the routes were busier at Christmas than at other times he replied that the cigarette route was busy all year. He returned to work with the respondent for three days at Christmas.

Determination

The Tribunal having carefully considered all the evidence are satisfied that sufficient efforts were not made to inform the claimant with regard to the procedure available to him to become a self employed contractor. The respondent never furnished the claimant with the available information. Furthermore the Tribunal is not satisfied on the evidence that the route as worked by the claimant was changed.

The Tribunal does accept that the respondent was experiencing a serious downturn and had to take steps to address this difficult situation.

The Tribunal awards the claimant compensation of €5,500 under the Unfair Dismissals Acts, 1977 to 2001 which reflects the fact that he was paid a redundancy sum in the amount of €3417,12 and the fact that the respondent had a genuine downturn in trade. As the claimant received a redundancy sum no award is being made under the Redundancy Payments Acts, 1967 to 2003.

While the Tribunal accepts that the Organisation of Working Time Act 1997 places a certain onus on the employer the reality of the situation was that the employer had no contact with an employee once he was out on his route other than to advise him to take his breaks. Furthermore while it may be that he did not take his breaks the Tribunal are of the view that it was for his own convenience and therefore the claim under the Organisation of Working Time Act, 1997 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

