EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
Employee MN801/2008
UD873/2008

against
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: Ms. E. Daly B.L.

Members: Ms J. Winters
Mr B. McKenna

heard this claim at Navan on 29th January 2009 and 14th April 2009

Representation:

Claimant(s) : Mr. Breffni Gordon BL instructed by James Murphy, Murphy Coady & Company, Solicitors, Commons Road, Navan, Co. Meath

Respondent(s) : Ms. Sarah McKechnie BL instructed by David O'Mahony, Diarmuid F Kelleher & Co, Solicitors, 6 Sheares Street, Cork.

The determination of the Tribunal was as follows:-

Respondent's Case

The first witness for the respondent was the Managing Director. He gave evidence that the company has twenty-five employees at present and produces confectionery, desserts and continental bread for the Leinster area. The claimant commenced working for the respondent as a pastry chef and also worked on deliveries. In February 2007 his job description changed to that of commercial manager as the company expanded. His new responsibilities included sales development, administration work, debt collection and research and development. This involved frequent travel and he was supplied with a company van to carry out his duties that was exclusively

for his use.

The company moved premises in 2007 and the claimant's responsibilities were exclusively in relation to work that occurred outside of the bakery and responsibilities within the bakery were allocated to another employee. The claimant would call to the office in the new premises three or four days per week but the duration of these calls would generally be only for one hour per day. He liaised with the bakery manager and the production manager in the bakery. In February 2007 he was paid a bonus of €5,000.00 for 2006 and received a further €5,000.00 in June 2007. This second payment was given an incentive payment when the company moved to their new premises. The claimant was an integral part of the company and was very enthusiastic and knowledgeable about his work.

On the 5 or 6 November 2007 the witness was informed by the claimant that he had been arrested on suspicion of being over the legal limit of alcohol while driving the company vehicle. The witness waited for the outcome of the court proceedings. Towards the end of April 2008 he discovered that the claimant had been convicted and was disqualified from driving for three years. The witness met with the claimant on two occasions in early May 2008 and the claimant was informed that he could bring a witness or a solicitor to the meetings if he wished to do so. He declined the offer. The claimant suggested that a driver be employed and he could continue operating as heretofore. The witness informed him that this proposition would be unworkable as his role (the claimants) involved him calling to the bakery at 4am on some mornings and driving to Dublin for 2pm the following day. It would also lead to insurance difficulties. Regrettably the witness had to make the decision to dismiss the claimant on the grounds of drink driving and breach of trust. The claimant was paid an ex-gratia payment of €3,000.00 and was also paid three weeks notice.

Under cross examination the witness confirmed that the claimant was not given a contract of employment until 2007. This contract is dated the 22 November 2002. The witness agreed that a document was created in 2007 and was backdated to November 2002 as the claimant was in the process of purchasing a property in France and needed to produce evidence of his employment in order for him to purchase the property. The witness accepted that he should not have done this and he should have been more sensible in his approach. He should just have written a letter stating that the claimant had been in employment since 2002 but he was simply trying to do him a favour by backdating the contract and it was done for the claimant's benefit. The witness accepted that a further letter dated 22 June 2007 and signed by him certifying the claimants employment and annual salary is inaccurate, insofar as it should have been written on different headed paper indicating the correct legal name of the employer at that particular time. This letter was written from a timeframe point of view and it took two minutes to write.

The witness gave further evidence that since claimant's dismissal turnover in the company has decreased. Turnover in the company had grown by 100% per year in the four years directly prior to the claimant's dismissal. He was aware of the ramifications for the company when he dismissed the claimant but he had to make his decision as to the right course of action both morally and legally. He confirmed that another employee in the company has been convicted of a drink driving charge and remains in employment. This employee did make bread collections but only if no other employee was available to do so. At the time of his conviction this employee was given a final written warning.

The witness agreed that the other two managers in the company were paid substantially less than

the claimant. He confirmed that the claimant's wages were grossed upwards when he was purchasing his property. His travel and subsistence were included as part of gross pay and this was financially penalising for the company.

The witness agreed that he continued to allow the claimant drive a company vehicle after his conviction for the drink driving offence. His conviction occurred in January 2008 but he did not lose his right to continue driving until the 1 June 2008. During that period he was considering whether or not to keep the claimant in employment. The claimant had suggested to him that he (the claimant) could employ and pay for a driver while he was disqualified from driving but the witness did not accept this suggestion because of possible insurance difficulties. It may also have created a redundancy situation when the claimant's disqualification period elapsed and would have compounded the issue of gross misconduct. Ultimately he took the decision to dismiss the claimant because he was guilty of gross misconduct and he was no longer able to carry out his job function due to the loss of his driving license.

Claimant's Case

The claimant gave direct evidence that he is a qualified chef. He is a French national and has worked in Ireland since 1999. He has also qualified as a pastry chef and commenced working for the respondent in November 2002. He worked six or seven days per week making products in the bakery and making deliveries of these products in the company vehicle. He worked for the respondent at his plant in Navan and worked from 7 pm until 4am producing bread and desserts. He also delivered these products to customers after working a 12 hourly shift and travelled to Dublin regularly.

Initially the company had about 15 customers but this increased to about 100 and he developed the turnover from €10,000 per week to €50,000 per week during his time working for the respondent. The active management of the business was in his hands. He had many contacts in Dublin from his previous employment and he drove forward the sales of the business. He constantly developed the business and was also had responsibility for managing staff. He often worked 16 hours per day and on one occasion almost fell asleep while driving the company vehicle. He approached the respondent about the possibility of being provided with a driver and a person was allocated to him for deliveries. This continued for about one year when he (the claimant) was provided with a new van.

In October 2007 he was arrested for drink driving and came before the courts in January 2008. He pleaded guilty to the offence and was disqualified from driving. An order deferring this disqualification until 1 June 2008 was made by the court. He apologised to the respondent for his mistake and knew that there might be disciplinary consequences but did not think that his job may be at risk. He saw some solutions to the difficulty insofar as that he could have reverted to going back to work with a delivery person, pay for a driver himself or use public transport. He put these possibilities to the respondent but they were not accepted. He was shocked when he was dismissed and has not obtained employment since his dismissal.

Under cross examination the witness confirmed that his working hours were not recorded and his hours were decided by himself. It was his objective to grow the business and the expansion of sales was done on his own initiative. He took about two weeks holidays per year. He was hired as a pastry chef in 2002 but his position changed to that of sales promotion. From 2003 until 2006 he worked in the bakery but was also on the road meeting customers, promoting and expanding sales. He drove his own company vehicle from 2003 often visiting the bakery during the night. He was

highly dependant on the vehicle and drove it from his home to his workplace. He was in charge of other drivers and agreed that it was his responsibility to set a good example to these other drivers. He accepted that from May 2007 until November 2207, a total of 17,783 kilometres had been clocked on his van and he had been the sole driver of that van, apart from two separate weeks during which he had been on holidays.

He agreed that his arrest and conviction for drink driving would have an impact on his employment but did not consider that it would finish his employment. He did not feel his conviction for drink driving would have an impact on his ability to manage other drivers within the company. He confirmed that he had put three options to his employer that would have resulted in him remaining in employment. Firstly he could send samples to his customers and follow these up using public transport. Secondly he would revert to travelling with a delivery driver and then call to his customers by foot, taxi or public transport. Thirdly he would pay for a driver at his own expense.
He agreed that he did not experiment with these proposals and the respondent did not accept the proposals.

In reply to questions from the Tribunal the witness confirmed that he drove to and from Dublin on a daily basis. He understood what a disciplinary meeting meant but he attended the disciplinary meeting with the respondent on the 6 May 2008 on the understanding that it was a gentlemans meeting and that did not understand that it could result in his dismissal. He contacted his solicitor prior to attending that meeting but his solicitor was unavailable to attend the meeting with him. He made his employer aware of this but did not seek a postponement of the meeting as his employer told him it would be a gentlemans meeting.

Determination

Having heard the evidence from both parties the Tribunal is satisfied by majority, with Mr. McKenna dissenting, that the reasons for dismissal in this case are twofold. (1) Gross Misconduct and (2) Incapacity to do the job. The Tribunal is of the view that the reason for dismissal was based primarily on incapacity to do the job and finds that the reasons given were reasonably held, the decision was reasonably reached and that the procedures adopted were fair.

The claimant's submission, that because the dismissal occurred four months after the respondent's knowledge of the conviction for drink driving (gross misconduct) the reasonableness of the decision is undermined, is not a submission that persuades this Tribunal. This is because the second reason; namely incapacity to do the job (driving ban) was not to take effect until June; a month after the decision to dismiss occurred.

Mr. McKenna in his dissenting opinion found that the dismissal procedures followed by the company were unfair. The claimant received a letter dated 29 April 2008 from the respondent requesting him to attend what was described in the letter as a disciplinary meeting. The claimant was invited to bring a colleague or a union representative. The claimant informed the respondent that his legal representative would be unable to attend. The respondent then told the claimant that the meeting would take the shape of a "man to man" meeting. This was completely misleading and denied the claimant his natural justice.

Mr. McKenna further opined that the admission by the respondent that they knowingly backdated a letter in respect of the claimant's employment, which reflected something that was not the case, reflected poorly on the respondent's case.

The Tribunal therefore by majority, with Mr. McKenna dissenting, is satisfied that the claimant was not unfairly dismissed and finds that the claim under the Unfair Dismissals Acts 1977 to 2001 must fail. The Tribunal is also satisfied that the claimant received his entitlements under the Minimum Notice and Terms of Employment Acts 1973 to 2001 and finds that this claim also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)