

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee

-Claimant

CASE NO.
UD1347/2008
MN1264/200

against

Employer

– Respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. J. Hennessy
Mr. D. McEvoy

heard this claim at Waterford on 13th May 2009

Representation:

Claimant: Mr. Walter Cullen, UNITE, Keyzer Street, Waterford

Respondent: A director of the company and the accountant for the company.

The determination of the Tribunal was as follows:

Respondent's Case:

A director of the respondent gave evidence to the Tribunal. The claimant commenced employment with the respondent in September 2007. His role was to drive the respondent's lorry for one of the company's clients.

The client's General Manager wrote a letter dated the 17th July 2008 to the respondent. The letter addressed to the director's son stated:

"I have spoken to you on several occasions about the driver you provide....

I am disappointed to see that matters have not improved. I still have concerns over his time keeping and his overall productivity. I have to let you know that I am now reviewing contracts and this situation is not going to reflect well on (the respondent) providing a lorry to (the client) in the future."

The director's son copied this letter to the claimant accompanied by letter dated the 18th July 2008 in which he stated:

“I am in receipt of a letter from (the client) received by me yesterday 17th July 2008, the contents of same are of a serious nature and I enclose a copy herewith for your perusal.

Please note that I must formally warn you that if matters do not improve I shall be left with no option but to terminate your employment.”

Copies of these letters were submitted to the Tribunal and were marked as being provided to the claimant “by hand.”

Subsequently, some two months later the claimant was dismissed. The director wrote letter dated the 19th September 2008 to the claimant, which stated:

“It is with regret that I confirm that your employment with us will cease on Friday 03rd October 2008.

The reason that your employment ceases is due to the fact that despite a number of verbal warnings from (the client) they are not happy with your performance and this is leaving us in danger of losing the lorry completely in with (the client).

I regret this course of actions and I take this opportunity to wish you well in the future.”

During cross-examination the director acknowledged that the respondent does not have a grievance or a disciplinary procedure. The director did not discuss matters with the claimant between the letter of the 18th July 2008 and the dismissal letter of the 19th September 2008. The director’s son was on holidays during that time and it was he who had day-to-day dealings with the claimant.

When the claimant was on holidays another person had covered his work. During this time the client told the respondent that they wanted this person driving the lorry all the time. The claimant was replaced on the 6th October 2008. The contract with the client continued for a further six months after this date.

The claimant was not provided with his P45, as he did not request it in writing. It was put to the director that the claimant was told he was dismissed due to re-structuring and not on foot of a complaint about his work. It was put to the director that the client’s letter stated a problem with “a driver” and that the claimant was not afforded an opportunity to appeal the respondent’s warning or the content of the complaint, as the company does not have a procedure in place. The director stated that the claimant could have addressed matters with him. The claimant was given an opportunity on several occasions to improve his work performance and he had received several verbal warnings in this regard. No written record was made of the verbal warnings given to the claimant.

Claimant’s Case:

The claimant gave evidence that he received a telephone call from the director’s son on the 23rd September 2008 and they arranged to meet. At the meeting the director’s son told the claimant that the company was “going badly” and he would have to let the claimant go. The director’s son told the claimant the only way the respondent could keep the lorry would be if the client hired the lorry from the respondent but employed their own driver. The claimant’s employment ended on the 3rd October 2008. A few days later the claimant became aware that another person was carrying out his duties.

During the course of his employment the claimant did not receive any verbal warnings and he was not made aware of a complaint from the client. The claimant did not receive the letter of the 18th July 2008 (or the copied letter of the 17th July 2008) or the letter of dismissal dated the 19th September 2008 from the respondent.

Mr. S gave evidence to the Tribunal that he was employed by the respondent from the 6th October 2008 to drive the lorry for the respondent's client. This job was offered to him in the week preceding the 6th October 2008 and some days before the 3rd October 2008. Mr. S had previously worked for the respondent when he had carried out the claimant's duties while he was on annual leave. Mr. S was unaware that he was filling the claimant's position until he started work on Monday, 6th October 2008. The respondent told Mr. S the client was unhappy with the claimant's work. Mr. S carried out the same work the claimant had, on the same contract and on the same lorry. The client's staff were surprised the claimant was replaced. Mr. S continued to work for the respondent in this role until 20th January 2009 when there was a downturn in the volume of work.

Determination:

The letter dated the 17th July 2008 from the respondent's client indicated that there was a difficulty with "a driver" but did not name the driver. On the balance of probabilities the Tribunal accepts that the driver was the claimant. However, the respondent's procedures in dealing with this complaint were non-existent.

The claimant clearly stated in evidence that he did not receive a copy of the letter of complaint from the respondent's client. During cross-examination the director of the respondent accepted that the company does not have grievance or disciplinary procedures. The claimant did not have an opportunity to defend himself against the complaint nor was he afforded an opportunity to appeal the decision to terminate his employment. The claimant's employment was terminated as and from Friday, 3rd October 2008 and a new driver was employed as and from Monday, 6th October 2008

The Tribunal finds that in all the circumstances the dismissal of the claimant was unfair. In considering the figure for compensation the Tribunal noted that the role, which the claimant had performed, was discontinued from the 20th January 2009 due to the downturn in the volume of work. Accordingly, the Tribunal awards the claimant €7,500 in compensation under the Unfair Dismissals Acts, 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails. It was the claimant's evidence that verbal notice was given to him on the 23rd September 2008. The last day he worked was the 3rd October 2008 and therefore the claimant is deemed to have worked his notice period.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)