EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE –*Claimant*

CASE NO.
UD1286/2008

RP1097/2008

MN1188/2008

against
EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. S. Ó Riordáin B.L.

Members: Mr. D. Moore
Mr. B. Byrne

heard this claim at Carlow on 5th May 2009 and 15th July 2009

Representation:

Claimant: Mr. Marcin Szulc, Maguire McClafferty, Solicitors,
8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent: Mr. Joseph Farrell, Joseph P Farrell, Solicitors, No 1 Maryborough Street, Graiguecullen, Carlow

The determination of the Tribunal was as follows:

Dismissal as a fact was in dispute between the parties.

Respondent's Case:

The respondent company has been in business for 32 years. The Managing Director (hereinafter MD) gave evidence that the nature of the business is residential waste collection and skip hire. The claimant commenced employment with the company in June 2006 and he was a good employee.

The company has a policy that there is one Irish employee on each of its lorries to ensure that any

customer queries are understood and answered. This policy was implemented after some complaints were received from customers. As a result a decision was taken on the 30th January 2008 to remove the claimant (who is a Polish national) from a lorry and put an Irish employee on the lorry instead. MD was later informed the claimant had subsequently verbally abused the Irish employee. The claimant's role as helper had remained unchanged by the switch.

On the same date MD was informed there was an accident at Portlaoise involving the claimant. He immediately drove to the location and when he arrived he offered to bring the claimant to his own doctor, the company doctor or the hospital. The claimant refused these offers and only allowed MD to bring him home.

The claimant alleged that he was on the steps at the back of the lorry as it pulled away from a gate and another vehicle had pulled out and hit him where he was standing on the steps of the lorry. After this incident the claimant submitted medical certificates to the respondent. MD did not receive the certificates from the claimant and he assumed the claimant was submitting them to the office, which is located off site. However, MD later discovered that from the time of the 30th January 2008 to July 2008 the claimant submitted only four or five certificates. There was no other contact from the claimant during this time.

Towards the end of July 2008 the claimant made contact with MD and said he was fit to return to work. MD asked the claimant to inform him of the date he would be returning to work. The claimant told MD he wanted to start back carrying out work in the yard. MD outlined to the Tribunal that during the height of the construction industry there were a lot of building materials to be sorted in the yard. However, by the time of July 2008 there was a decrease in the business the respondent received from this industry. In addition one of the respondent's competitors was providing the service below cost. As a result the respondent's two employees who worked on the recycling materials in the yard were put as helpers on the respondent's lorries. One other employee who has a medical condition was retained in the yard carrying out the recycling work.

MD did not have a problem with re-engaging the claimant in July 2008. The problem was the claimant wanted to return to a specific role. When the claimant told MD that he was fit to return to work but wanted to work in the yard, MD told the claimant that it was not possible to provide him with work in the yard. He asked the claimant to inform him what day he would be returning to work and in turn MD would tell him what lorry he would be working on. Approximately one week later the claimant contacted the office and requested his P45, which was provided to him in early August 2008. MD did not dismiss the claimant but presumed when the claimant requested his P45 that he had secured other employment. MD subsequently received notification on the 22nd September 2008 of a personal injuries claim on behalf of the claimant.

During cross-examination MD stated the respondent has a similar number of employees as in 2008. The respondent did not make any of its employees redundant but redeployed the employees to working on the lorries instead.

MD outlined to the Tribunal the difficulty he had with believing the claimant's explanation of the accident on the 30th January 2008.

In reply to questions from the Tribunal, MD confirmed the respondent does not have a procedure in place regarding the obligations of employees when they are absent from work. The only obligation on an employee is to contact him when they are returning to work. The respondent does not pay employees when they are absent on sick leave. The claimant was not provided with a contract of

employment, a copy of a disciplinary procedure, a sick leave policy or any other document regarding the terms and conditions of his employment.

The second witness to give evidence was MD's brother (hereinafter MW). The company has employed him for over twenty years in the role of lorry driver. The witness gave evidence regarding the events of the 30th January 2008. He commenced work at 5.30am and as there werecomplaints from customers about not having an Irish employee on each lorry, he removed anotheremployee (J) from his lorry and put the claimant on the lorry with him. During the journey toPortlaoise the claimant used his mobile phone to contact J and verbally abuse him.

When they arrived at Portlaoise, MW parked the lorry in front of two gates. A vehicle reversed out of another gate and allegedly hit the claimant. When MW enquired of the claimant what had happened, the claimant said the vehicle had hit him. MW had not felt any impact on the lorry. The claimant held his wrist and said it was painful. MW offered the claimant a doctor or an ambulance but the claimant refused both. MW contacted MD who arrived sometime later. MW did see the claimant after this date.

The Accounts and Office Manager (hereinafter AOM) gave evidence to the Tribunal that she has very limited contact with the respondent's employees. The office is based some distance from the respondent's yard. AOM recalled meeting the claimant once.

AOM outlined the procedure for sick leave; if an employee is missing for three days they must provide the respondent with a medical certificate. If an employee has a long-term illness AOM expects them to submit regular certificates. Usually employees contact the office if they are absent due to illness and the office requests that the employee submit a medical certificate.

Medical certificates submitted by the claimant were opened to the Tribunal. The claimant submitted a total of five medical certificates and these covered him from the period of the 30th January 2008 up to the 7th April 2008. No further medical certificates were received from the claimant and there was no further contact with the claimant until August 2008. In early Augustwhen AOM attended for work, her colleague informed her the claimant had attended at the officethe previous day seeking his P45. AOM generated the claimant's P45 and inserted date of cessation as the 1st August 2008, as she was completing wages for week ending 1st August 2008. The claimant was paid any outstanding holiday pay. AOM believed the claimant had subsequentlycollected the P45 from the office. AOM confirmed that notification regarding a personal injuriesclaim was received after the claimant's P45 issued. It would not have been possible for AOM togenerate a P45 in September for a date in August once month end was completed.

Claimant's Case;

The claimant giving evidence described himself as a good employee without any disciplinary issues in the course of his employment. On the 30th January 2008 he had an accident at work. He did not accept MD's offer to bring him to a doctor, as he did not want to cause trouble. He outlined to MD what had occurred in relation to his injury. Later that day the claimant attended a doctor. The claimant stated he had suffered an injury to his back and ankle. MD did not contact the

claimantafter this date to clarify what had happened.

The claimant attended his doctor once or twice a month after the accident. A record of the dates the claimant attended his doctor was opened to the Tribunal. The claimant requested a medical certificate from his doctor for the first five weeks. When the claimant submitted the last certificate an employee in the office told him that there was no need to submit further certificates. The claimant was told he needed to submit only one other medical certificate stating he was fit to return to work. The claimant could not recall who had told him this.

The next contact the claimant had with the respondent was when he tried to return to work. The claimant could not recall the exact date but thought it was towards the end of August 2008. The last certificate the claimant had from his doctor stated the claimant was fit to return to work. The claimant met with MD and told him he was better and ready to return to work. The claimant was still suffering from some pain, which would prevent him from working on the lorries so he asked MD to provide him with yard work. MD informed the claimant no such work was available but that the claimant should return the following week and MD would think about it in the meantime.

The claimant returned to the yard the following week and he again asked if it would be possible to be given yard work. Again it was reiterated to the claimant that work in the yard was not available and that he would have to work on the lorries. The claimant saw another employee working in the yard who could have covered the lorry work while the claimant worked in the yard. The claimant asked once more about yard work as his condition meant that he could not work on the lorry. The claimant was told that if the work was not suitable to him he should ask for his P45. The claimant said if a P45 was being issued to him could it be issued as soon as possible for social welfare purposes. The claimant did not mention anything to MD about resigning. The only reason the claimant could think of for being dismissed was that he was unable to carry out lorry work. The claimant believed that he received his P45 on the 3rd September 2008. The claimant did not agree that the level of work in the yard had decreased during the time he was absent.

During cross-examination the claimant accepted that MD was content him to return to work on the lorries. The claimant was unhappy about returning to work, as his condition would not allow him to carry out the work on the lorry. The claimant confirmed that his doctor had certified him fit to return to work on the 1st September 2008 but as the claimant was still suffering pain he wanted to work in the yard. The claimant accepted that he did not provide MD with any additional documentation outlining that he required lighter duties.

In reply to questions from the Tribunal, the claimant confirmed that MD was content for the claimant to return to work in his original capacity.

Determination:

The central issues in this case are, firstly, whether or not there was a dismissal and, secondly, if there was a dismissal, whether it was an unfair dismissal under the Unfair Dismissal Acts, 1977 to 2007, or a situation of redundancy under the Redundancy Payments Acts, 1967 to 2007. The respondent is adamant that there was no dismissal and that the claimant voluntarily left his employment and the claimant is equally adamant that he was dismissed.

It is clear from the detailed evidence that there is a fundamental disagreement between the parties

both in relation to the timing of meetings between the claimant and the MD of the respondent company and what was said at the meeting.

In brief summary, the claimant indicated that the crucial meeting was held at (or close to) the end of August/early September, whereas the respondent said that the meeting was held at the end of July 2008. The claimant, who was contemplating returning to work after a period of sick absences following an alleged work related injury to his ankle (a separate personal injury case is being pursued) on 30 January 2008, indicated that the respondent MD refused his request to be given light work in the yard rather than return to his work as a helper on the waste collection lorries and dismissed him. The respondent MD agreed that he was unable to provide light work in the yard as the waste separation work in this area was related to building construction waste and this work had substantially diminished by July 2008 resulting in the reassignment of two of the three yard staff to lorry helper duties. The respondent, however, indicated that he told the claimant that his job as a lorry helper was available to him when he was fit to return and that he was surprised when he learned that the claimant had looked for his P45 a week later.

The Tribunal's consideration of the case was not helped by the absence of a written contract of employment outlining terms and conditions of employment and of a written sick leave policy or of evidence from the front office staff member to whom the claimant spoke in relation to his P45 but it is nonetheless required to come to a determination.

The Tribunal, after careful consideration of the evidence, is disposed to accept that the respondent did not dismiss the claimant. The Tribunal was influenced in this regard by the following:

(1) the claimant under cross examination was quite uncertain in relation to a crucial event, i.e. when the alleged dismissal occurred, and was in that regard an unreliable witness;
(2) the accounts and pay documentation show that outstanding holiday pay and the P45 was issued in the first week of August 2008 which better supports the evidence of the respondent MD and the accounts and office manager;
(3) the evidence of the respondent MD to the effect that light waste sorting work was not available in the yard due to the decline in the building construction sector was persuasive;
(4) it was common cause between the parties that the claimant's job as a lorry helper was available to him at the meeting;
(5) the claimant gave evidence in cross examination that he had not been prepared to return to work as a lorry helper at the meeting with the MD;
(6) no medical evidence in support of the claimant's request for light work (because of his ankle injury) was mentioned to the MD and the final fit for work certificate submitted by the claimant to the Tribunal makes no reference to any qualifications in this regard;
(7) the claimant gave evidence on cross examination to the effect that, in his speaking to a front office staff member, he requested that, ***if*** a P.45 was to be issued to him, it should be issued as soon as possible – the reference to ***"if "*** appears to denoteuncertainty in his mind as to whether he was or was not dismissed by the MD;
(8) there is no evidence from the accounts and office manager of any involvement by the respondent MD in the request for the issue of a P45 form; and
(9) no staff were made redundant in the respondent company.

The Tribunal, in the circumstances, determines that the respondent did not dismiss the claimant and that the claimant's case under the Unfair Dismissals Acts, 1977 to 2007, fails. The claimant's claim under the Redundancy Payments Act, 1967 to 2007 and under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)