

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee
1

-claimant

CASE NO.

UD1352/2008
MN1273/2008

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 Flanagan BL

Members: Mr M Murphy
Mr J Moore

heard this claim at Navan on 12th May 2009

Representation:

Claimant: Power Stephens & Co., Solicitors,
Deanstown House, Main Street, Blanchardstown, Dublin 15

Respondent: Traynor Mallon & Co., Solicitors,
86 Clanbrassil Street, Dundalk, Co. Louth

The determination of the Tribunal was as follows: -

Respondent's Opening Statement

It was the respondent's case that the claimant had resigned and that the last day worked by him was 25th October 2007. It was contended that the claimant was a director not an employee. The claimant owned 30% of the shares in the company. A meeting was held in February 2008 at which the claimant was voted out as a director. The claimant and another director both had access to a company van for work; the usage of the van was not treated as a benefit in kind. A dividend was paid in 2006 of €10,000. The three directors were each paid at the same level of remuneration. Tax and PRSI were paid at the appropriate directors rate.

Claimant's Opening Statement

It was the claimant's case that he was an employee of the respondent company and that he had worked as a machine operator/labourer. The claimant had made application to the High Court for the payment of wages due to him with no issue being raised in the respondent's

affidavits denying his status as an employee. The claimant believed that the date of his dismissal was 14th May 2008 as that was the date up to which he was paid when he received his final payment.

Claimant's Case

The claimant approached an individual, who ultimately became Director 1 of the respondent, and asked him if he would like to set up a company together. Director 1 agreed and also involved his brother who became Director 2 and they split the shares 30% to the claimant, 30% to Director 1 and 40% to Director 2 (as he owned the premises from which the respondent operated). They went into business in January 2002. There were three directors in all and the claimant was the third. Initially, the claimant took on the sales role as he had a lot of contacts in the industry and he relied upon these contacts in order to generate business for the respondent. Director 1 took over the sales role when the respondent was well established so that the claimant could return to his role as a machine driver. The claimant worked long hours and was paid as an employee; he had not been furnished with either a contract of employment or statement of the terms & conditions of his employment.

The claimant received his orders from the respondent. On 25th October 2007 the claimant was doing a job in west County Dublin with a view to doing a job later on that day in north County Dublin. Some other staff went ahead of the claimant to set up for the second job, the claimant had to stay behind and load the machines for the next job. The claimant arrived at the second job to find evidence that the staff had been there but had left so he proceeded on to the respondent's premises. The claimant arrived at the yard where he met with Director 2 who asked him why he had not answered the telephone three days previously, to which the claimant replied that he was on a machine and did not hear the telephone ringing. The claimant asked Director 2 what the problem was and Director 2 said he had been informed that the claimant was speaking badly of him behind his back. The respondent rang to say he needed the claimant's van and left a replacement for the claimant but it did not contain any work tools. The claimant received a phone call from Director 2 on 26th October verbally abusing him and saying that he did not want to work with him anymore. The claimant said that if that was the case he should buy his shares from him. There was some discussion about the share value and subsequently the claimant decided to seek legal advice. The claimant was advised to return to work by his legal adviser but when the claimant tried the office staff advised him that the other directors had said that he was not allowed on to the property. The respondent rang the claimant and told him not to return to the premises as he was upsetting the staff.

The claimant agreed to meet with the accountant and respondent in April 2008 to discuss the price of the shares. At this meeting a solicitor for the respondent was present, they proceeded to call a meeting of the board of directors where the other two voted that the claimant be removed as a director, to stop paying his wages and to reclaim his company van. Proper procedures in relation to the meeting were not followed. On 9th May 2008 the respondent took the claimant's van and telephone from him and they ceased paying him his wages. The claimant received his P45 through the solicitor in August 2008. The claimant is still a shareholder but he does not receive copies of the accounts he requests nor is he part of any general meetings or directors meetings. The claimant considers himself as dismissed without proper disciplinary procedures having been carried out.

Respondents Case

Director 2 gave the claimant instructions on the scheduling of work but the claimant had an active role in making decisions in relation to the company. On the day the incident took place the claimant returned to the premises at 2.00pm. Director 2 questioned the claimant about not answering the

telephone three days previously. The respondent was very critical of the claimant and suggested that the claimant was trying to skive off work. The respondent had assumed that the claimant had resigned from the tone of his voice. The respondent had needed certain parts that were in the claimant's van and so he arranged to take it back and replace it with an empty one. The respondent met with the claimant who told him that he wanted to sell his shares. The respondent continued to pay the claimant even after he left but decided to deduct it from the claimant's shares. The respondent changed solicitors and was then advised to recover the van and to stop the claimant's wages. The respondent has suffered with the downturn and has very little work, they would no longer be able to afford to pay the claimant should the Tribunal choose to reinstate or reengage him.

Determination

The Tribunal has carefully considered the evidence and submissions of the parties including those submissions submitted after the hearing and which the Tribunal had requested.

The respondent had denied that the claimant was an employee. It was common case that the claimant was both a shareholder and had been a director of the respondent. The Tribunal is not satisfied, given the paucity of evidence before it, that the meeting which purported to remove the claimant as a director of the respondent followed proper procedures or even had the power to do so and therefore the Tribunal regards the claimant as probably remaining in his office as a director of the respondent. It was also agreed that the claimant operated a machine that laid slipform kerbing and the Tribunal is fully satisfied that the nature of the work carried out by the claimant as the operator of a twelve ton machine working 40 to 50 hours per week laying concrete kerbs went well beyond the duties of a director and that the claimant was indeed an employee of the respondent.

The Tribunal does not find it credible that the respondent genuinely believed that the claimant had indicated his resignation to his employer merely by the use of a tone of voice. It was common case that the claimant was no longer welcome to attend at his workplace but that he was paid for a substantial period thereafter. The Tribunal does not accept the contention of the respondent that these payments are to be regarded as *ex gratia* payments. The Tribunal finds that the date of termination of employment was 14th March 2006, which was the date on which the respondent ceased to pay the claimant. The Tribunal finds that the employment of the claimant was terminated without the application of fair procedures. Additionally the Tribunal finds that the termination of employment lacked substantive justification. Insofar as there were conflicts of evidence the Tribunal prefers the evidence of the claimant. The Tribunal accepts that there was no grievance procedure for the claimant to use and is doubtful as to whether it would have availed him any.

The Tribunal finds that the claim under Unfair Dismissals Acts, 1977 to 2007 succeeds and awards reinstatement.

The Tribunal considers reinstatement to be the appropriate remedy as the respondent company might reasonably be regarded to be a quasi partnership and because the claimant has a continuing involvement in the respondent as director and 30% shareholder such that a clean break is not feasible.

It was the uncontroverted evidence of the respondent that the three directors were each paid at the same level of remuneration. The Tribunal has had regard to the argument made by the respondent that it has very little work due to the downturn in the economy and therefore the respondent would no longer be able to afford to pay the claimant should the Tribunal choose to reinstate or reengage him. The Tribunal finds that the rate of pay the claimant for the purposes of the calculation of his

arrears is the average rate of pay granted to the other two directors since the date of termination.

In the calculation of the sum to be awarded to the claimant as arrears of pay due to him and which forms part of his reinstatement the Tribunal wishes to express its view that the respondent is entitled as the employer to require from the claimant a full accounting of any income earned since the date of termination and to withhold that sum from the arrears as it is the view of this division that the making of an award of reinstatement does not entitle the claimant to have earnings in excess of what he would have obtained had the employment continued without interruption.

Although the Tribunal is satisfied that the claimant had been dismissed without notice from his employment the effect of the decision of the Tribunal in relation to his claim under the Unfair Dismissals Acts, 1977 to 2007 to reinstate the claimant is to restore the claimant to his employment as if he had never been dismissed and therefore the claim under the Minimum Notice And Terms Of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)