

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

claimant

MN1454/2008

UD1507/2008

WT189/2009

Against

EMPLOYER

respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Cagney BL

Members: Mr. D. Moore
Mr. P. Woods

heard this claim at Dublin on 6th May 2009 and 16th September 2009 and 6 November 2009

Representation:

Claimant(s): Ms. Mary Paula Guinness B.L. instructed by Kevin Tunney, Solicitors,
Millennium House, Main Street, Tallaght, Dublin 24

Respondent(s): Ms. Susan Lennox B.L. instructed by Pdraig O'Donovan & Company,
Solicitors, Unit 3, Block 7, Abberley Law Centre, High Street, Tallaght,
Dublin 24

The determination of the Tribunal was as follows:

Dismissal is in dispute in this case

Claimant's Case:

The claimant told the Tribunal that he was employed as a base controller with the respondent and commenced employment in 1996. Ms. S operated a company and she bought telephone lines in 1999 and the claimant moved to work with the respondent. He did not receive terms and conditions of employment or a contract of employment. He worked five nights a week from 11p.m. until 7a.m. He was paid weekly by cheque and he received part payment in cash. His cheque recently increased to €320 and he did not receive a payslip. He took a taxi home on Sundays, as there were no buses early on Sunday mornings. He took a week's holiday every year, which he did not get paid for. A doorman in a local club made a complaint to the claimant that JOD

took work out of turn and the claimant documented this in a diary. The other drivers knew that JOD was getting work as their cars were parked outside the premises. He recalled having a meeting in a pub in April/May 2008 with Ms. S and a few others. The purpose of the meeting was to address the downturn in business. They drank tea and coffee at the meeting and after the meeting they started drinking. He did not receive a warning in the pub. On 8th November 2008 he arrived in work at 2.50p.m. Ms S's son, KS, gave him a letter and asked him to sign it. He looked at the letter and discovered that there were two inaccuracies. The letter he was presented with in the Tribunal was different than the letter that KS asked him to sign. He did not sign the letter and KS told him that if he did not sign the letter that he could not work. He told KS that he could not sign the letter. The claimant put on his jacket and went home. He was in no doubt that his employment was terminated. The claimant was shocked to be dismissed and disappointed that Ms. S did not speak to him herself.

He had not received any verbal warnings in twelve years. After the meeting in the pub Ms. S spoke in general and she mentioned to the claimant that she wished that JOD and the claimant would get on better. Regular meetings did not take place. The claimant loved his job and enjoyed being busy. The attitude of management changed in the last couple of months. Certain things happened which were unusual. Approximately five base controllers were employed and the claimant was the longest serving employee. He did not receive a reference from the respondent. He has not received a P45 to date and he is in receipt of social welfare benefit. The claimant was not subject to any disciplinary measure of any kind. He was not advised in any way regarding customer complaints. His shift changed and he was on the 3 to 11 shift and the value of work had decreased. Instead of earning €100 for a shift he earned €80.

The claimant was unaware that KS was listening in to conversations on the radio and KS never confronted him with a recording. The claimant was never disciplined for passing over drivers for work or for any other matter involving other employees.

The documents submitted by the respondent in relation to his annual leave were not an accurate reflection of the holidays he had taken. The claimant had worked every bank holiday and he did not get an additional day off in lieu or receive extra pay for working a bank holiday. The claimant only take a week's holiday as he could not afford to take any more than that.

In cross-examination he stated that he did not receive verbal warnings. He reiterated that drivers complained that JOD was assigned work unfairly. He did not speak to Ms. S on 3rd May 2008 and he was not shown a letter of complaint in this regard. The meeting on 20th May 2008 was not held to facilitate him. He was not given a third verbal warning in 2008 or a fourth verbal warning on 9th June 2008. He reiterated that he never received a verbal or written warning. The letter of 8th November 2008 came as a complete surprise to him. He could not recall if he was in receipt of a back to work allowance on 15th September. He received €100 cash for working shift at the weekends.

It was not true that there was favouritism in the way the claimant distributed work. The claimant worked five shifts two years ago and in 2007 he worked four shifts. Each shift was of eight hours duration and for two shifts he received €240,00. If he worked four shifts he received €320,00. He worked thirty hours at 10 euro per hour. In relation to the sum of €80 he received in cash he did not know how his wages were calculated. The claimant did not have problems with any other members of staff.

He was not advised to get on with JOD at a meeting on 5th November 2008. He did not receive a

written warning and the first he heard of verbal warnings was at the Tribunal hearing. He did not consult with KS in this matter. He was very disappointed that Ms. S did not deal with the situation herself.

KS told the claimant that he would discuss the matter with his mother. KS was not willing to allow the claimant to talk to Ms. S. Due to the fact that there was a downturn in work in the last six to eight months the employees were more inclined to observe what was going on. He was of the opinion that JOD was a silent partner in the respondent and observed what was going on in the respondent. He heard complaints about the unfair allocation of work to JOD approximately twelve times.

It was put to the claimant that he had started work for the respondent in 2000 and that a document from the social welfare confirmed his Back-To-Work scheme started on the 12th September 2000. The claimant stated that he had claimed social welfare up to 2000 but he had worked part-time in another cab firm before he started work with the respondent on a part-time basis in December 1997. It was put to the claimant that was not possible as the company was only incorporated in 1998. The claimant replied that the company was established for a long period of time before it was registered. He confirmed that his commencement date was around the time that Ms. S purchased the telephone lines from another company. In 2000 he worked four and sometimes five shifts per week. In 1997 he worked three shifts on a part-time basis. He had been informed by the social welfare that he could claim social welfare and work twenty hours per week and Ms. S arranged that for him. It was not until 2000 that he was on the Back-To-Work scheme.

It was put to the claimant that JOD was passed over for work. The claimant denied this and stated that he evenly distributed the taxi work. Another driver (LA) had complained that JOD had taken work out of turn. The other drivers could only hear the claimant's side of the conversation over the radio and not what LA had said. The claimant told LA that it was a matter for Ms. S to deal with. The claimant stated that the first time he had heard about alleged exchanges relating to passing drivers up for work was on the last day of the Tribunal hearing. It was never put to him by management.

It was put to the claimant that in August 2008 he had informed hotels that people would be quicker walking rather than wait for a taxi from the respondent. The claimant stated that it was possible on a given night and a given situation that he may have said that. For example, if there was trouble on the street in the vicinity of the hotel.

In reply to questions from the Tribunal, the claimant confirmed that from 1997 to 1999 he worked only weekends for the respondent. When he commenced the Back-To-Work scheme in 2000 it meant that he could earn more money by working more shifts but he would still receive an allowance from social welfare. From 2000 he worked four or five shifts per week. From 1997 to 2000 he did not receive any holidays. The claimant was aware that he was entitled to extra money for working public holidays but he did not pursue this issue with the respondent.

The claimant was adamant that he did not pass drivers over for work. At no stage was an issue raised with him about the drivers. He did receive complaints from JOD but management never raised this issue with the claimant. The claimant continued to work weekends and other busy shifts and he did not receive complaints. The claimant stated that to his knowledge customers had not complained about him. While the issue of a complaint from Mrs.C was raised on the last day of the Tribunal hearing, this had never been raised with the claimant during this employment.

VK gave evidence that he commenced employment with the respondent in 1998 as a hackney driver. He confirmed that the claimant was working for the respondent as a base controller in 1998 and that the claimant mainly worked the 11pm to 7am shift.

JD gave evidence that he commenced employment with the respondent in 1998 and the claimant was working there at that time.

Respondent's Case:

Ms. S gave evidence that she is the Managing Director of the respondent which was incorporated in September 1998. She secured the premises for the company some twelve weeks prior to this. She knew the claimant as he had worked for other cab companies. At that time Ms. S had two telephone numbers for the business. She agreed to buy a third telephone line in 1998.

In 2000 the individual she had purchased the number from subsequently opened a cab company across the road from the respondent. Ms. S attended at this premises due to an issue regarding the usage of her cab account number. The claimant was working for that cab company at the time and was there when Ms. S confronted the individual. Subsequently, the claimant commenced work with the respondent in 2000 and not 1997 as he had stated.

Ms. S investigated about the Back-To-Work Schemes with social welfare and the claimant agreed to commence this scheme. Ms. S was certain that prior to 2000 the claimant did not work for the respondent. Ms. S and her son had issues with the claimant throughout his employment and these issues escalated in 2008. A number of drivers left the respondent's employment as they said that work was issued unfairly as the claimant had "favourites." Ms. S tried to give the claimant the benefit of the doubt but when her brother-in-law (DL) left the respondent's employment she had to reconsider. There were constant problems concerning the nightshift. Drivers prefer local work as it is more lucrative and Ms. S' brother-in-law (DL) complained to the claimant that he was unfairly distributing the work. He also complained to Ms. S and terminated his employment. When all the conflict started in 2008 Ms. S made attempts to resolve matters. JOD also complained about being passed over for work and Ms. S changed the claimant to afternoon shifts so she could oversee his shifts in an effort to resolve matters. The claimant was unhappy about the change in his shifts. The shifts were changed on the 1st November 2008 and a female employee (PG) worked the night shift instead of the claimant.

Ms. S outlined the difficulties with the claimant throughout 2008. In April 2008 the claimant complained to Ms. S that JOD was taking work out of turn. This was untrue and a verbal warning was given to the claimant. On the 5th May 2008 Mrs. C wrote a complaint regarding the claimant. Ms. S subsequently held a meeting on the 20th May 2008 with PG, KS and the claimant regarding a number of issues. Ms. S spoke with the claimant in depth about JOD and explained that he was entitled to work. Ms. S received a complaint from DB on the 20th June 2008 about the claimant and then on the 9th July 2008 she received a complaint from LA. In October 2008 PG complained about the claimant. A further complaint was received from Mrs. C on the 2nd November 2008 about the claimant and JOD continued to have ongoing problems with the claimant. On the 3rd November 2008 PG complained that about a telephone call the claimant had made to her and she had recorded the telephone call.

On the 5th November 2008 Ms. S met with the claimant and informed him that there was a threat that the respondent would lose drivers because of complaints received about the claimant. Ms. S informed the claimant that he would receive a written warning. Ms. S wrote a written warning to

the claimant informing that the written warning was being given to him after many verbal warnings and a formal warning at the base controllers meeting on the 20th May 2008. KS handed this letter to the claimant on the 8th November 2008. The claimant would not accept the written warning and he terminated his own employment. The claimant's P45 was subsequently posted to him.

The claimant worked only three shifts for the respondent otherwise his differential rent would increase and he would lose his medical card. He did not want to work four or five shifts per week. The company could not afford to pay extra for bank holidays so it was treated as any other Monday but employees were provided with an extra day's holiday if they worked Christmas day or Stephen's day. Ms. S stated that she did everything she could to sort matters out for the claimant but he did everything he could to disrupt the respondent's business.

On 6th November 2009 Ms. S gave further evidence that the claimant was paid in cash in 2005, 2006 and 2007. The claimant received €320 for working three days a week and he did not pay tax on this amount. The claimant was entitled to twelve days annual leave and he got paid three days in lieu for 25th December, 26th December and 1st January. The claimant was paid for his breaks. He did a late night shift and there was very little work between 3am to 5am and he could have taken his break then.

During cross-examination Ms. S confirmed that her brother-in-law (DL) left her employment during 2006. She accepted that the handwritten versions of the complaints differed from the typed versions as she had typed them from recollection for the Tribunal hearing. Ms. S stated that she told the claimant that DL had made a complaint that the work was unfairly distributed as some drivers got more local work than others but the claimant always denied this when Ms. S spoke to him. She explained to the claimant that all drivers were to be treated equally.

Ms. S did not record minutes of the meetings she held with the claimant as they were discussions held in the office. She confirmed that she did not ask the claimant to sign any documents to confirm that he had received verbal warnings.

It was put to Ms. S that although it was her evidence that she had experienced difficulties with the claimant she had given him a wage increase in 2007. Ms. S stated that she paid both the claimant and PG more as they were experienced base controllers and they worked weekends. Ms. S was trying to be fair to the claimant and she hoped that the difficulties would be resolved. Ms. S stated that "the last straw" was when PG produced the tape of a telephone call she had received from the claimant.

It was put to Ms. S that the claimant had received an entirely different letter on the 8th November 2008 than the letter submitted at the hearing. Ms. S stated it was the same letter and it related to the formal warning given to the claimant on the 5th November 2008.

It was put to Ms. S that the letter dated the 11th November 2008 informed the claimant that his employment was terminated and it was put to Ms. S that his employment was terminated by the respondent. Ms. S stated that the letter was written for the claimant for social welfare purposes and what she meant by the letter was that his employment was terminated. Ms. S wrote the letter as a result of a text message the claimant sent to KS which stated that he wanted a letter for social welfare purposes.

Ms. S accepted that she had a legal obligation regarding bank holidays and public holidays but she had an arrangement with the employees. She admitted that she did not have an accurate record to

indicate the public holidays that the claimant worked and she did not have an accurate record of his holidays.

In reply to questions from the Tribunal, Ms. S stated it was not possible she had made a mistake regarding the claimant's date of commencement.

PG told the Tribunal that she had been employed as a base controller with the respondent since 2007. She knew the claimant as she worked with him. She stated that the claimant made comments about JOD on a regular basis. A meeting took place on 20 May 2008 at a pub in Tallaght, this was a base control meeting to discuss new regulations and staff were now going to be paid by cheque. An issue was raised regarding the treatment of JOD. In the early hours of 1 November 2008 she received a telephone call on her mobile at approx 6a.m. from the claimant who had drink taken and he was angry. The claimant told her that she should not be taking personal calls from drivers. He told her that they should stick together, he tried to patronise her. For most of the conversation he spoke about JOD and he told her there was no way he was going unless he was paid to go. At the base control meeting on the 20 May 2008 the claimant was told if he did not stop this trouble he would be sacked and it was not out of the blue that the claimant received a warning in November 2008.

In cross examination she stated that she was never involved in a disciplinary meeting. She then stated that she, Ms. S, KS, another employee and the claimant attended the meeting. She knew that all matters would be addressed at the meeting and this was the only meeting she had attended in a pub.

KS told the Tribunal that he worked in base control since 1999 and he obtained a hackney licence two years ago. In 2007 he became director of the respondent. His mother Ms. S is a director and head of the respondent. He helped out and if requested he got involved in personnel issues. Prior to the claimant taking up employment with the respondent the claimant worked for a small cab company and he was not used to doing account work so he observed KS on one of his shifts. When he became a director in 2007 he had a two-way radio and he could listen to conversations between the base controllers and the drivers. In the last year the claimant had major problems with a driver JOD and he gave him bad work over the radio. If the claimant heard JOD on the telephone he would purposely not answer his telephone and when another driver called in he would give him work, that started at the commencement of 2008 until November 2008.

He gave the claimant a verbal warning on 11th June and 13th July 2008 as he had received complaints regarding the claimant's behaviour in work. Ms. S spoke to the claimant on 5th November regarding a complaint made by an employee PG on 3rd November 2008. On 5th November 2008 his mother spoke to the claimant and informed him that he would be getting a written warning. On 8th November 2008 he deputised for his mother Ms. S who instructed him to issue the claimant with a written warning. The claimant reported for work at 3p.m. in very bad humour. The claimant asked where 16 J was which meant he had loads of bad work for JOD. He told the claimant that there were two letters at the desk for him. He told him to read the letter and sign the written warning. The claimant took up one of the letters and walked around the room mumbling the words of the letter, he then stopped and said he was not signing it as drivers would laugh at it. He told KS that he could shove his job and the claimant left the office.

After the claimant left he telephoned his mother who was of the opinion that the claimant went to the pub KS received a text from the claimant and he requested a letter to enable him to obtain

social welfare. He gave the message to his mother, he put the letter in the claimant's letter box but he did not see the content of the letter.

In cross-examination he stated that when the claimant was good he was very good, and he brought his own social life into his job. He did not feel that salary should be judged on performance. Employees were not informed that he had a two way radio and that he could listen in on their conversations. Employees were not given terms and conditions of employment. On 9th June he told the claimant that he was getting a verbal warning. He could not give an explanation as to why two letters of warning issued to the claimant. The claimant refused to sign the warning. He told him that he was going to contact his mother. The claimant never told him that there were inaccuracies in his letter. He stated that the claimant's employment terminated on Saturday 8th November 2008.

DB told the Tribunal that he was a driver and had dealings with the claimant. The claimant told DB that he did not like JOD. He asked the claimant if he could sort it out as he was interfering with other drivers. The claimant had a personal vendetta against JOD.

Determination

On the evidence presented to it the Tribunal is satisfied that the letter produced at the hearing did not indicate a dismissal. While the claimant may have indicated that he was concerned regarding its content it was open to him to raise the matter further. The evidence presented to the Tribunal was that he did not raise the matter further and he wanted a letter from the respondent to enable him to obtain social welfare benefit. The respondent could reasonably construe that the claimant no longer wanted to work for it. The claim under the Unfair Dismissals Acts, 1977 to 2007 fails. As the claimant was not dismissed from his employment he is not entitled to minimum notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

There is an obligation on the employer to provide records for employees under Section 25 (1) of the Organisation of Working Time Act 1997. The respondent admitted that it had a deficiency in its records and the Tribunal accepts the claimant's statement in relation to holiday pay and pay for public holidays. The claimant is entitled to €1,920.00 in lieu of annual leave and €704 in respect of eleven public holidays totalling €2624.00 under the Organisation of Working Time Act, 1997. This calculation is based on the claimant's weekly wage of €320.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)