

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE UD364/2009,MN369/2009
claimant

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: Mrs. M. Quinlan

Members: Mr R. Murphy
Mr G. Whyte

heard this claim at Dublin on 2nd October and 10th December 2009

Representation

Claimant: Mr Niall Neligen B L instructed by Mr. John Greene
PC Moore & Co, Solicitors, 17 South Great Georges Street, Dublin 2

Respondent : Mr Richard B Hendrick, RBH Project Management Ltd,
17 Charnwood Park, Clonsilla, Dublin 15 on 2nd October and
Connor Bowman BL instructed by Paul Cunney, P O'Connor & Son Solicitors,
Swinford, Co. Mayo on 10 December 2009

The determination of the Tribunal was as follows:

Respondent's Case

As a participant in the haulage business the respondent runs and maintains a number of trucks. Its depot in Ballycolin in west Dublin acts as a departure point for their vehicles either travelling to the docks at Dublin port or as is more common for direct deliveries to its various clients throughout the country. Among those customers is company A who is based in county Mayo including the towns of Castlebar and Foxford. According to the then transport manager (LF) all their drivers worked within the statutory limits of driving hours. That included the claimant. His contract of employment stated, *inter alia*, that his weekly working hours were based on working a minimum of forty-seven hours and thirty minutes inclusive of "lunch breaks." However the respondent retained the right to require the claimant to work overtime. The claimant was also instructed to clock-in and out of work at all times. The transport manager commented that hours in excess of the statutory limits were as a

consequence of the claimant's delay in not fulfilling his tasks within the stipulated times allowed.

Prior to employing the claimant the transport manager satisfied himself that the claimant who was a Hungarian citizen had the proper qualifications, experience and competence to undertake driving duties for the company. Between his commencement of employment in July 2007 and up to an incident in Castlebar on 15 August 2008 the claimant had been involved in two road accidents while in the service of the respondent. While little personal or material damage was done on those occasions the witness felt it necessary to issue what he called a verbal warning to the claimant due to those mishaps.

The witness referred to two other people who oversaw the operations of drivers. A female transport clerk (CM) and the owner/managing director (MD) of the company had some input into the work and control of drivers. While stating that the claimant never complained directly to him about his hours of work the witness was less certain as to whether the office administrator passed on the claimant's complaints to him. Depending on the route and the load the claimant commenced employment anytime between 07.00 and 10.00. On Friday 15 August 2008 the claimant started work at 10.00 when he headed for Castlebar preceded by a stop at Mullingar, county Westmeath for the purposes of carrying out company operations.

Upon reporting for work on Monday morning 18 August 2008 the witness was informed by the transport administrator that the claimant had been involved in another mishap the previous Friday. After listening to that person's version of events the witness proceeded to call the claimant to his office where following some discussion on this incident the transport manager suspended him pending an investigation. Due to the nature of this incident and the amount of damage done at company's A depot the respondent needed to complete an insurance form. The transport manager again met the claimant on 21 August 2008 when the insurance paperwork was addressed.

Prior to meeting the claimant for a third time on 28 August the witness and the MD of the company discussed the claimant's case. They jointly decided to dismiss the claimant based not only on his involvement in this costly incident, which was the "final straw" but also on earlier incidents. The claimant was informed of that decision during the course of a disciplinary meeting that day. According to the witness the claimant admitted in a statement that he was responsible for the accident, which not only seriously damaged property, but also put a strain on the relationship the company had with this valued customer in the west. The claimant signed that statement which was written by the witness. It was neither translated nor was it signed by the claimant's representative/witness who also acted as interpreter. The witness commented that the decision to dismiss the claimant was both for the benefit of the company and for the claimant as the alternative was that the respondent was not "sure where they would end up next" had it not taken that action.

At the resumed hearing CM confirmed that she was employed by the respondent as the transport clerk. A "clock-in" system was in place for warehouse and office staff. Drivers used tacographs and all drivers had to be recorded. On 15 August 2008 the claimant telephoned her and informed her that he was involved in an accident. She contacted the MD and the claimant was well looked after. She met the claimant on the following Monday 18 August 2008 along with LF. They discussed what happened and LF completed the accident report form and he told the claimant that he would be suspended until the investigation was finalised. The claimant was not told that he was being sacked. The claimant told LF that his employment was terminated and there was no further discussion with the claimant after that. The claimant's employment was terminated at a meeting on 28 August 2008.

In cross-examination she stated that she commenced employment with the respondent in 2001 and was on a career break in 2007. She was not employed with the respondent when the claimant had an accident on the M50. On 15 August 2008 she met with the claimant and the claimant's friend. She had no recollection of LF telling the claimant that he was dismissed.

In answer to questions from the Tribunal she stated that she did not have a management role. She was familiar with tachograph legislation.

AD was general manager with the respondent in 2008 and she prepared a memo for drivers on the instruction of the MD. The memo was attached to drivers pay slips. It was not possible for drivers to clock in and the respondent relied on a tachograph.

In cross-examination she stated that the respondent operated within the legal time constraints and there were no infringements.

In answer to questions from the Tribunal she stated that it took ten minutes maximum to undertake a visual check of a truck.

The MD told the Tribunal that the respondent employs fifty, twenty-five of whom are drivers. The claimant was given a contract of employment and he would be asked to sign it. He became aware of an accident on 15 August 2008 when one of his trucks was damaged causing €20,000 worth of damage. He was not aware that the claimant was suffering from fatigue.

He was aware of another accident that the claimant had on the M50 when the truck that the claimant drove crossed over the road and hit a car. The respondent employed a full time mechanic and if there was a problem with a truck it would be reported. It was impossible to drive a truck with a broken mirror. It was normal practice for the driver to report an accident to CM or LF and this is documented in the respondent's handbook. He spoke to the claimant about the accident on 15 August 2008 and he told him that his driving was unacceptable. He had a discussion with LF and CM about the accident and a decision was made to suspend the claimant. A driver could be suspended without pay. A meeting was arranged for 28 August 2008 and the claimant was made aware of how serious the accident was.

It became clear to him that he had to take what action that he saw fit as the premises where the accident occurred was closed for three hours. There was no way that the claimant could be retained in employment and the claimant's employment was terminated. The claimant did not mention fatigue /exhaustion and staff undertook set routes. The respondent had thirty five to forty vehicle inspections by the Road Safety Authority and if the regulations were breached its licence would not be renewed. The respondent operated to the highest standards. He would be appalled at a suggestion that the claimant suffered from exhaustion. The witness drove a lorry and he would not expect a driver to do anything he would not do. The respondent insurance costs had increased to €200,000, which was an increase of 12%.

In cross-examination he stated that all drivers were presented with their contracts of employment on joining the respondent but they may not physically receive them for a period of two months. Drivers did not take out the vehicles unless they were road worthy. On 15 August 2008 he received a call from CM and he asked her if anyone was hurt. He made the decision to dismiss the claimant. LF did not have the authority to do it.

In answer to questions from the Tribunal he stated that off loading was a rest period and drivers did

not participate in loading and unloading of vehicles. When a driver reported to work the first thing they did was check the truck. After driving for four and a half hours the driver must take a break.

Claimant's Case

A witness on behalf of the claimant told the Tribunal that he was a friend of the claimant's. After the accident on 15 August 2008 the claimant told him about the accident and asked him to go to a meeting on Monday 18 August 2008. The claimant needed help with translation and the claimant did not want to go the meeting on his own. The meeting was arranged for 12 noon and present were the witness, LF, CM and the claimant. The claimant needed to sign a form regarding the accident. LF informed the claimant that he was not needed again and his employment was terminated. The meeting lasted twenty to thirty minutes.

In cross-examination he stated that the claimant was given a one page printed form. The document explained the circumstances of the accident.

The claimant told the Tribunal that he started work with the respondent at 7a.m. He then went to the truck and attached it to the container. He checked the oil, water, windscreen, lights and all around the truck and he then drove the truck. He checked the container and if he was requested to go to the port he did so. On average his day started at 7a.m during the first three months of his employment. He regularly worked more than 47 ½ hours a week. He asked LF if it was possible to start later. On many occasions he went to the port in a truck and when he returned he had to change trucks.

On the week of the 11 August 2008 he made a complaint that he had to drive a lot and he did not get paid overtime. CM told him that she was well aware of this and that she could not do anything about it as the MD told her this is how it is to be done.

On 15 August 2008 he went to work at 7a.m. and inserted his card as usual. He attached the container to the truck. He then went to the port for a full container and then went back to the respondent. He then left to go to Ballyhaunis. He spent three hours in Mullingar due to a traffic jam and normally he did not spend more than one hour there. He received a call from CM and she asked him the reason for the delay and he told her he could not get out of Mullingar due to a traffic jam. He went to company A's yard and he picked up a container and when he attached the container it started to move. He fell from the truck and when he tried to stop the truck he slipped. He pulled the handbrake, as he did not want to cause damage to the truck. He crashed into a trailer across the yard. He telephoned CM after this and this all happened very fast. His friend collected him and took him home.

He kept in touch with CM and he met her and LF on the following Monday. LF asked him for a report of what happened on Friday, he told him what happened and LF told him that the damage to the truck was €28,000. LF told him that he was suspended. He asked LF if he could give him another chance. He tried to do everything perfect in his job. LF told he when someone causes damage like that they could not give him another chance. He was one hundred per cent sure on leaving the meeting that he had lost his job. At the beginning of the meeting LF used the word dismissed. He attended a further meeting on 21 August 2008 and he did not attend a meeting on 28 August, as he was not in Dublin. His signature was on a statement dated 28 August 2008 and here iterated that he attended a meeting on 21 August, which took maximum of twenty minutes. LF told him that he was satisfied with his work but he could not give him a reference. LF told the claimant if he received a telephone call in relation to his work he would inform

the caller that the claimant was a good worker.. He never received a verbal warning. Any time he met the MD he asked him how he was and he never received a caution.

In cross-examination he stated that he was sacked three days after the accident. At the start of the meeting he was told by LF that he was suspended and LF asked him to tell him what happened on Friday. LF told him when someone causes such damage he does not get a chance. He was told he was dismissed on Monday and it was clear that he had lost his job. When asked that he was suspended and then sacked he replied yes you could say that. On 21 August LF 2008 asked him to attend a meeting and he completed a form regarding the accident. In relation to the statement he signed on 28 August 2008 he did not know when he signed this as after 21 August 2008 he was not in the respondent's premises. He did not sign the statement with his signature dated 28 August 2008 on either the 21 or 28 August 2008. He was one hundred per cent sure that he only attended two meetings. He attended an interview in Wexford on 28 August 2008 but he could not recall who interviewed him on that date.

He complained to CM that he was driving too much and not getting paid overtime. He did not document his complaints in writing. He believed that he was very tired on the day that the accident occurred on 15 August 2008. He has not obtained alternative employment. He is in full time education since September 2009. He was not aware if he had a right to appeal the decision to dismiss him.

SC told the Tribunal that she came to Ireland in 2006 and she knew the claimant. She attended the meeting on 21 August 2008. Present at the meeting were LF, CM the witness and the claimant. LF requested the details of the accident, which occurred on 15 August 2008. LF told the claimant that the insurance company would not be able to cover him again and that he could not give the claimant a written reference. The claimant asked about overtime and LF told him that procedures will be followed and overtime will be paid. A P45 was requested to enable the claimant obtain social welfare. LF did not use the words dismiss and the purpose of the meeting was to fill in forms for insurance purposes. She did not attend a meeting on 28 August 2008 with the claimant.

In cross-examination she stated that LF told the claimant he could not work with the company any longer.

Determination

The Tribunal is of the unanimous view that the dismissal was unfair. There was a total lack of proper procedures in the respondent. There was no evidence of an appeal offered to the claimant and there was little evidence of the claimant having received previous warnings. However the claimant contributed to his dismissal and in the circumstances the Tribunal awards the claimant compensation of €15,000 under the Unfair Dismissals Acts 1977 to 2007. The claimant did not receive notice on termination of his employment so therefore he is entitled to compensation in the amount of €581.13 which is equivalent to one weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)