

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE **-claimant**

UD378/2009

MN390/2009

WT167/2009

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: Ms. B. Glynn

Members: Mr. B. O'Carroll
Mr. P. Clarke

heard these claims at Athlone on 22 October
and 1 December 2009

Representation:

Claimant:

Mr. David Heffernan B.L. instructed by Ms. Masa Maye,
Catherine Allison & Co. Solicitors, 6 Roden Place,
Dundalk, Co. Louth

Respondent:

Mr. Michael O'Sullivan, ARRA HRD Limited,
Castlelost West, Rochfortbridge, Co. Westmeath

The determination of the Tribunal was as follows:

Dismissal as a fact being in dispute between the parties it fell to the claimant to prove the fact of dismissal

At the outset the claim under the Organisation of Working Time Act, 1997 was withdrawn.

Following a short period of employment, in April 2007, as a machine operator in the recycling shed for the respondent's refuse recycling business. The claimant was then re-employed, from 1 May 2007, as a mechanic/digger driver. The claimant is a self-trained mechanic without formal qualifications in that field and worked with a fully qualified mechanic (FQ) in the mechanical maintenance of the respondent's machinery and vehicle fleet. The employment was uneventful until the spring of 2008 when FQ left the employment and the claimant was the sole employee responsible for mechanical maintenance. From time to time the services of an outside contractor were used to assist in vehicle maintenance. There is a dispute between the parties as to whether the claimant was issued with a contract of employment and employee handbook. The respondent asserts that contracts were proffered to all employees in the autumn of 2007 following the attendance of a director (AD) of the respondent at a local enterprise board course on 17 October 2007. The respondent accepted employees had not signed these contracts due to a dispute over a clause in the contracts covering the insurance of driving whilst using a mobile phone.

After FQ left the employment the claimant's position is that he found his responsibilities for the maintenance of the respondent's equipment to be quite stressful but was happy in his job until some time in July 2008 by which time he felt the vehicle fleet was in bad condition, not always in compliance with legislative requirements, and that the machinery in the recycling plant was constantly breaking down. It is common case that he and the managing director (MD) had exchanged words on a few occasions in regard to the prioritising of work. This had previously resulted in the claimant leaving briefly to take the time to cool down. At this time the respondent had around 33 employees.

On Tuesday 16 September 2008, a day when MD was on the premises and the yard foreman was on a week's leave, one of the respondent's three teleporters had two flat tyres and the claimant arranged for a local tyre contractor to fix the teleporter tyres. The following day an employee, who wanted to use the third teleporter, telephoned MD, who was in the UK for the day, to complain that the machine again had a flat tyre. MD then told the claimant that he would have to pay for the repairs to the tyres as the claimant should have taken the wheels off the machine and taken them to the contractor for repair. MD's position is that this was an idle threat and he never intended the claimant to pay for the repair. He accepted that he never told the claimant that it was an idle threat.

The same evening, 17 September 2008, on his return from the UK, MD noticed an oil spillage in the area where the claimant services vehicles. On the morning of 18 September 2008 MD called to the premises and accepts that he was not soft-spoken when bringing the potentially serious implications of the oil spill to the claimant's attention. The claimant accepted responsibility for the spillage. MD then left to go to Kerry to inspect some machinery he was proposing to purchase satisfied that the claimant would clean up the spillage. He further instructed the office manager (OM) to compile a report on the incident, a requirement under the respondent's environmental licence. When MD returned to the premises that evening the oil spillage had not been cleaned up. There were three items of plant in the workshop, a teleporter, a van and a trailer.

When MD arrived at the premises at around 9-00am on Friday 19 September 2008 he first of all berated two employees over the way they were removing some handrails prior to their being used on a new piece of plant. This was some 35 yards from the workshop where the claimant was

working in a pit under the trailer. After leaving the two employees MD then drove across the yard to the workshop and began to shout for the claimant, as MD could not see him. MD was complaining about both the oil spillage not being cleaned up and the trailer not being repaired. The wrong parts had been supplied to repair the trailer's brakes and MD wanted the trailer moved without brakes the short distance on the public road to the respondent's recycling facility to be filled prior to its return to the workshop for the completion of the repair before it was sent to the landfill for emptying. MD accepts that he also complained about the teleporter tyres. The claimant then began to remonstrate with MD, threw his tools into his van and drove off, saying, "I'm not taking this any more." The respondent's position is that the claimant drove off in an erratic manner. The claimant's position is that he needed to get out and clear his head so he went home to cool down.

The outside contractor completed the repair to the trailer, which was not moved prior to its repair. MD repaired the teleporter and the local dealer fixed the van so that the repairs to all three vehicles in the workshop on the morning of 19 September 2008 were complete that evening. The claimant did not return to work throughout the remainder of the day and MD made no attempt to contact him. On Saturday 20 September 2008 MD's father, who did not give evidence to the Tribunal, telephoned the claimant. The claimant's position is that it was agreed that the claimant and MD would try and sort things out. The respondent's position is that his father told MD that the claimant would be in touch with him over the weekend.

There was no contact between MD and the claimant until Tuesday 23 September 2008 when the claimant attended at the premises for a health check arising from an infection another employee had been found to be carrying. The claimant attended for this health check at around 10-00am, he came in his car as opposed to the van with tools he normally brought to work. After the health check the claimant met MD and asked, "What's the story?" MD told the claimant to go to OM to be sorted out. OM asked the claimant to sign a document addressed "To whom it may concern" and stating, "I confirm that I left the respondent of my own accord with no notice period given and in doing so broke my contract of employment with the company." The claimant refused to sign the document but requested his P45, which was supplied the following week. The claimant's position, refuted by both MD and OM, is that MD had accompanied the claimant to OM's office when the claimant was asked to sign the letter of resignation. On the evening of 23 September 2008 the claimant telephoned OM to ask her opinion if he had done the right thing in not signing the letter. OM declined to get involved in the issue and suggested that the claimant get advice in the matter.

Determination

This is a case in which the claimant states that he was constructively dismissed. Such a dismissal will occur where an employee terminates a contract of employment in circumstances in which, because of the employer's conduct, either the employee was entitled to terminate the contract without notice, or it was reasonable for the claimant so to terminate it. Accordingly, any constructive dismissal must therefore be examined under two headings, the first being Entitlement, and the second being Reasonableness. In both cases the termination must be in response to the employer's conduct.

Entitlement

Under this heading an employee is entitled to terminate the contract only where the employer is guilty of conduct which is either of significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by one or more of the contractual terms of the contract. One must remember that there exists in the continuing relationship of employer and employee a mutual need for trust and confidence. Accordingly, as an employer is entitled to expect his employee to behave in a manner which would preserve his employer's reasonable trust and confidence in him, so also must the employer behave. In this case the claimant had been working with the employer for a period of approximately two years as a self-trained mechanic. Initially there had been a second mechanic but, after he left, the claimant was the sole mechanic, servicing all of the employer's vehicles in his waste disposal business, which, at the time employed 33 employees. Evidence was given by the claimant that while he enjoyed his work, he found it extremely demanding and stressful. The claimant further gave evidence that he and MD had exchanged words on several occasions as a result of which the claimant briefly left work to cool down. In particular, the claimant gave evidence in respect of two incidents over which he had been reprimanded by MD, one being an oil spillage in the yard, which he had neglected to clean up, and the other the hiring of an outside company to deal with a flat tyre on a teleporter. In the latter incident the claimant gave evidence that MD informed him that he would have to pay for same and while this was confirmed by MD, he said it was an idle threat.

On 19 September 2008, MD, after reprimanding the claimant in respect of his neglect to clean up the oil spillage, told the claimant to stop working on the vehicle in the pit, and to move it to his recycling area. In evidence MD admitted raising his voice when speaking to the claimant. At the time the trailer had no brakes and would have to be moved on the public road to reach the recycling area. A row ensued, at the expiration of which the claimant threw his tools in the van and drove off. The claimant's evidence was that he needed to clear his head and had taken this course of action in the past where matters between the two became heated. This was on a Friday. There was no contact between the employer and the claimant until the following Tuesday when the claimant called at his work premises for the purposes of a health check which was taking place therein on the day. His evidence was that he was approached by MD and told to go to OM whereupon he was presented with a document, which appeared to be a letter or resignation. The claimant refused to sign same whereupon he requested his P45.

Considering the facts at length the tribunal have come to a decision that the claimant was entitled to determine his contract, which decision is based on the following facts: -

- (a) The claimant was not issued with a contract of employment nor employee handbook at the outset of his relationship with the claimant, and while there is a conflict of interest as to whether these documents were given to the claimant at a later point, it is clear that he was not aware of the existence of a grievance procedure.
- (b) Evidence was given by the claimant, and the Tribunal accepts same, that there was no one to whom he could refer the matter for the purpose of discussion or resolution, as the evidence adduced showed that all matters in the work place were dealt with by MD.

Reasonableness

Under this heading the reasonableness of the employee must be considered with reference to all of the circumstances of the case and especially where there have been changes in the terms, conditions or personality of the workplace, which the employee may find difficult to accept. In this case, it is

clear from the evidence that the claimant came under tremendous pressures after the initial mechanic left to maintain and keep on the road the vehicles belonging to his employer. It is also clear from the evidence furnished by the claimant and other witnesses in the case that MD is of a strong and forceful personality who may not always communicate diplomatically with his employees in resolving disputes. Evidence was given by an ex-employee that he was forced to drive unroadworthy vehicles, as a refusal meant dismissal, though this was denied by MD, who stated that he had never received any prosecutions under the Road Traffic Acts in respect of his vehicles. In evidence he accepted, under cross-examination, that he told people “to take it or leave it”, but denied that he ever bullied or harassed staff members. Indeed the claimant gave evidence that he toyed with leaving the employment on several occasions due to the strong personality of MD, but did not do so due to financial restraints. It is clear from the evidence that when the claimant called to his employers premises on 23 September 2008, the employer asked him to sign a form which was basically a letter of resignation, when the claimant thought that his employers direction to go to the office was for resolution purposes. Accordingly, in the circumstances this Tribunal is satisfied that the events which transpired on 23 September, 2008 entitled the claimant to consider that the behaviour of the employer was such as to allow him to regard himself as being constructively dismissed on that day. However, the claimant is not without blame in the matter as it is the Tribunal’s opinion that he contributed to his situation by failing to clean up the oil spillage which had occurred several days earlier and accordingly, the Tribunal measures the award due to the claimant under the Unfair Dismissal’s Act, 1977 to 2007 at €21,000.00.

The Tribunal having found that this was a case of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)