

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE -*Claimant*

CASE NO.
UD711/2008

RP602/2008
MN647/2008
WT291/2008

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 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Limerick on 30th April 2009

Representation:

Claimant: Mr. Gearóid Howard, Crimmins Howard, Solicitors,
Dolmen House, Shannon, Co. Clare

Respondent: Mr. Darach McCarthy, Darach McCarthy & Co., Solicitors,
53 Catherine Street, Limerick

The determination of the Tribunal was as follows:

BC held a licence from the Company to deliver its bread. The respondent had a number of meetings with BC about his bread run and the transfer of the licence to him. The respondent paid BC €20,000 (the equivalent of the previous year's profit/earnings) whereupon BC surrendered the license to the company and it was assigned to the respondent, effective from 17 February 2008. Initially the respondent had the use of the BC's van and while he (the claimant) was paying the lease it had never been assigned to the claimant and remained in BC's name. According to BC this arrangement was reached because the respondent was not in a position to get the finance. However, BC failed to provide the respondent with VAT receipts as agreed and the claimant bought his own van.

BC had employed his brother, the claimant, as a helper in the van, from March 2001 to February

2008 and he had also employed AE (another employee) as a relief driver 4/5 days per week while he (BC) drove a hackney. It was the respondent's position that he had not discussed the two aforementioned employees with BC prior to the transfer of the licence and that the claimant had asked him about the job and he had employed him on a trial basis because he knew the routes, the customers and the orders. BC's evidence was that the respondent had agreed prior to the transfer to take on the two employees. The claimant's evidence was that the respondent had not mentioned working for a trial period to him.

The claimant sought wages of €400.00 per week on the basis that this was what BC had paid him. The respondent reduced this amount by €50.00 as he (the respondent) was loading the van and the claimant started work at a later time. At AE's request the respondent employed him for a short period of time until he opened his own business (around March 2008). In the interim the respondent was undertaking other work.

Prior to transfer of the licence, the respondent had worked as a relief driver for the company and when he had, on occasions, driven BC's van the claimant was the helper in the van. On those occasions the claimant had the hand-held computer and made the decisions as to the amount of bread to deliver to the supermarkets/customers. The respondent told the claimant that he was responsible for the documentation and the hand held computer. He told the claimant to keep the managers of the supermarkets and shops, to which they deliver the bread, happy.

The claimant commenced employment with the respondent on the 17 February 2008. He was responsible for delivering the correct quantity of bread to the various supermarkets and shops. Having worked with his brother, the respondent believed the claimant knew his duties. It was the respondent's intention that when AE (the driver) finished with him in March 2008, the respondent would driver the van and the claimant would be his helper. However, there were a number of difficulties with the claimant's work.

Within the first week of the claimant's employment the manager of a new and large supermarket on his bread run contacted the respondent to inform him that there was a shortage of the company's bread on the shelves. The respondent had to deliver bread in his private car to the supermarket, which was 65 miles away. On arriving there at midday, the respondent found that the shelves were almost empty and the bread from the previous day was on a trolley in the storeroom. The claimant should have put that bread on the shelves. The respondent thought that if the shelves had been filled at 09.00 it was unlikely that the bread would have been almost sold out a few hours later at midday. The manager of the supermarket was very unhappy about the situation. The respondent raised the matter with the claimant who maintained that he had filled the shelves.

On Friday, 22 February 2008 the respondent received a second complaint again relating to a shortage in the delivery to another supermarket. The respondent raised this with the claimant who maintained that he had made the correct delivery. It was the claimant's evidence that the shelves were full when he visited the store.

The respondent considered the matter over the weekend. He explained to the Tribunal that his licence allowed him to return 450 units of bread and he had to pay for all returns above that. When he examined the dockets over the weekend he discovered that there were far more than 450 units returned. The respondent made a decision to terminate the claimant's employment.

There was a dispute between the parties as to when the claimant was given notice of his dismissal. It was the respondent's evidence that he gave the claimant one week's notice on Monday, 25

r Tuesday 26 February 2008 that he was terminating his employment due to the problems with the deliveries. It was the claimant's evidence that he was given his notice on Wednesday 27 February and that the respondent would not tell him the reason for his dismissal.

The respondent met the claimant on Thursday, 28 February 2008 and paid him €350.00 for the previous week's work. The claimant wanted to be paid the €350.00 due for the current week but the respondent did not have it and told the claimant he would pay him the following week. The claimant threatened the respondent. This was witnessed by AE and confirmed by him in his evidence to the Tribunal. Because of the threat the respondent decided to end the claimant's employment there and then. The respondent subsequently went to the claimant's home to pay him the outstanding €350.00 although the claimant had only worked four days that week. The respondent's evidence was that he had not taken the threat seriously. After the dismissal the respondent made the deliveries and he had no further problems with the supermarkets/customers. He does not employ anyone at this time. After the dismissal the respondent discovered that BC had paid the claimant less than had been indicated to him by the claimant.

According to the claimant, when he met the respondent on the last day of his employment with him, the respondent shouted at him in a supermarket, in front of customers, that the bread was displayed incorrectly. The claimant had threatened the respondent in the car park of the supermarket because he was angry when the respondent told him he was not going to pay him and the respondent shouted at him in front of customers. The respondent denied shouting at the claimant in front of customers in a supermarket; the only reason he met the claimant there was to pay him his wages.

The Company's Regional Sales and Logistics Manager (RSLM) referred to clause 20 of the agreement, which provides that the rights and license may not be assigned in whole or in part to any person or entity without the prior approval of the Company. He was present at two meetings between BC and the respondent and there had not been any discussion about employees or assets. The discussion centred on the respective buying and selling of the route.

It was common case that within a month of his dismissal RSLM had offered the claimant employment at a higher wage and he had accepted the offer. However, he did not show for work on the first night as his sister was in hospital. When RSLM contacted him about this the following day the claimant agreed to commence that night but he again failed to show. It was the claimant's position that he found it difficult to get to work as he does not hold a driver's licence. It was RSLM's evidence that the person who took up that job is still in the position at the time of the Tribunal hearing, some fourteen months later.

BC admitted that he had refused to sign the Agreement with the Company.

Determination:

The Tribunal finds that the transfer of the bread run combined with the taking over of the payment of the lease of the van and the two employees constituted a transfer of undertakings under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003 (S.I. 131/2003). The Tribunal makes this finding notwithstanding clause 9 of the Agreement, which entitles the Company, on the occurrence of certain events at the fault of the licence holder, to terminate the agreement. Accordingly, the claimant's employment was continuous as and from 2001 and the Tribunal has jurisdiction to hear the claim under the Unfair Dismissals Acts.

The respondent failed to apply fair or any procedures to the dismissal. Accordingly, the dismissal was procedurally unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal finds that in failing to take up the offer of employment, at a higher wage, made to him within a month of his dismissal the claimant failed to mitigate his loss. Taking this failure into account the Tribunal awards him €1,050 under the Acts. The Tribunal is satisfied that this is a just and equitable award in all the circumstances.

The Tribunal awards the claimant the sum of €1,190.00 (this amount being equivalent to 3.4 weeks' gross pay at €350.00 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Redundancy Payments Acts, 1967 to 2007 is dismissed. The claim under the Organisation of Working Time Act, 1997 was withdrawn during the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)