

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
- *claimant*

CASE NO.
MN406/2009
UD392/2009

Against

EMPLOYER
- *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Clancy

Members: Mr. W. O'Carroll
Mr T. Kelly

heard this claim at Limerick on 20th April 2010

Representation:

Claimant: Michael Deecy, B.L., instructed by McMahon O'Brien, Solicitors, Mount Kennett House, Henry Street, Limerick

Respondent: Elizabeth Mullins, B.L., instructed by John Cooke, Solicitor, Hospital, Co. Limerick

The determination of the Tribunal was as follows:-

Respondent's Case

During direct evidence the respondent told the Tribunal that he has been a haulage driver since 1988. In 1994 the respondent bought his own truck and over time the company grew and the respondent now employs 11 drivers in his haulage company.

The respondent explained to the Tribunal that at the time of the claimant's employment, the respondent's company was contracted to carry out work for a third party, hereafter referred to as the main contractor. This was the only contract for work that the respondent held at the time of the claimant's employment.

Prior to hiring a new driver the respondent must provide the main contractor with certain details in respect of the driver such as passport and driving licence. The main contractor then carries out a background check on the driver for security clearance. After approximately one week, the main contractor informs the respondent if the driver can be employed to transport their product. The

main contractor does not provide the respondent with a reason for their decision and the respondent is not aware of the details of the background checks carried out by the main contractor. The respondent's employees are aware that the main contractor carries out these checks.

The respondent supplies the main contractor with the transport for their product and the man to operate the truck. After that, the main contractor instructs the man in the performance of his duties. The main contractor and the respondent have an agreement in place whereby the main contractor can cease using the respondent's company by providing one month's notice.

Every load is monitored by the main contractor and they stay in contact with the driver to ensure that the driver stays with the truck at all times.

The claimant commenced employment with the respondent in February 2006. The respondent had no issues with the claimant and found him to be a very capable operator. In February 2008 the claimant was sent to the UK with a load from the main contractor. On arrival in the UK the claimant was arrested and detained by police. The respondent received a phone call from the main contractor's HQ to let him know the situation. The respondent had no connection or contact with the police in respect of the claimant. The security manager of the main contractor dealt with the police.

The respondent referred to a letter he received from the claimant explaining that his detention had arisen from a series of phone calls he had received in February 2006. This was the only knowledge the respondent had of the situation. The claimant asked the respondent to retrieve some personal items from his truck. The respondent did not do this because the main contractor had already removed them.

The following September the claimant arrived to the respondent's yard looking for his job and his truck back. The respondent told him that he would have to check with the main contractor. The respondent contacted the security manager in the UK and was told under no circumstances was he to employ the claimant to carry out any of their work.

The respondent told the claimant to come to the house the following Wednesday. He then informed the claimant that his hands were tied and he could no longer employ him as a driver. The claimant did not look for a reference but he did ask the respondent to reimburse him for an air conditioning unit and the respondent agreed to pay half.

The respondent told the Tribunal that the claimant was in receipt of €110 per day, €45 wages and €65 expenses.

The respondent told the Tribunal that the claimant's arrest affected the operation of his business. After the arrest, not one week would pass without one of the respondent's trucks being stopped in a port in Dover and checked by customs for approximately 1 hour to 1 and half hours. This would result in the convoy not arriving to security parking on time and there would be uproar with the main contractor. This continued for approximately four months.

The respondent said that he had no way to keep the claimant in employment. The main contractor would not allow the claimant to drive for them and all of the respondent's work was dependent on the main contractor. The respondent received correspondence, in respect of the claimant, from a solicitor firm in Manchester dated 29th September 2008 which stated "*not found guilty of any offence and there are no outstanding charges against him*".

Cross examination

In cross examination the respondent agreed that the claimant was not party to the owner/driver agreement that existed between the respondent and the main contractor. The claimant held a separate contract directly with the respondent. The respondent confirmed that during the claimant's employment he did not provide him with a contract of employment or grievance and disciplinary procedures.

The respondent explained that it was pressure from the main contractor and its client that led to the termination of the claimant's employment. However, the respondent did confirm that the claimant had been exonerated of any charges.

The respondent accepted that he did not pay the claimant from February 2008. He also accepted that he did not tell the claimant that he would be dismissed until the dismissal occurred. The respondent told the Tribunal that he was aware of the claimant's failure to secure employment with another company.

The respondent told the Tribunal that if he were faced with the same ultimatum from the main contractor again that he would act in the same manner.

The respondent did not accept that the claimant was in receipt of a gross weekly wage of €836.

Claimant's case

The claimant told the Tribunal that he worked as a haulage driver for the respondent since February 2006. In February 2008 the claimant was driving a truck to the main contractor's headquarters in the UK. When he arrived at headquarters he went to the toilets and on his return to his truck the police were waiting. The claimant was informed that he was being arrested on suspicion of conspiracy. The claimant was denied bail because he did not have an address at which to reside in the UK.

After seven months, the claimant was released from custody. The charges against the claimant were dropped and no prosecution proceeded. During his seven months detention the claimant did not receive any communication from the respondent. On the evening of the claimant's arrest, he phoned the respondent from the police station.

On Monday 8th September the case was dropped. On the Tuesday the claimant tried to obtain his wallet and passport. On the Wednesday he flew home. The claimant told the Tribunal that he assumed that because he was innocent he would just return home and continue to work for the respondent.

On his return home, the claimant went to see the respondent. The respondent shook hands with the claimant and told him he was delighted to see him home. The respondent told the claimant that his truck was in Poland and would not be back for two weeks. The claimant made a number of phonecalls and texts to the respondent about starting back to work. The claimant did not receive any response to these attempts and after approximately three weeks he was asked to call down to the respondent's house.

When the claimant arrived at the respondent's house the respondent explained to the claimant that he found himself in a situation with the main contractor whereby they did not want the claimant to

operate any trucks transporting their goods. The respondent told the claimant that his hands were tied.

Cross Examination

In cross examination the claimant told the Tribunal that the phonecalls received in 2006 were from people looking for his location. He provided these people with false locations because he did not know who they were. The claimant informed the main contractor's head of security, JMcD, about the phonecalls. JMcD did not see any seriousness or issue with the phonecalls.

The claimant confirmed that he did not work directly for the main contractor but he did work under their umbrella for ten years and therefore, he was aware of their security requirements. The claimant maintains that as he is innocent, he did not breach any security requirements.

During re-examination the claimant told the Tribunal he felt that the respondent should have fought harder with the main contractor and made representations on his behalf to get his job back.

Determination

The Tribunal heard that the employer's business relied heavily on one client, the main contractor. The respondent entered into a business contract with this client. It is the responsibility of the respondent to ensure that he can comply with a contract before agreeing to it. The client was aware of the situation involving the claimant and on direction from this client the respondent decided to effect a summary dismissal. In doing so, the respondent did not carry out an adequate investigation into the claimant's situation.

The respondent failed in his duties to the claimant. The claimant was not in receipt of a contract of employment. There was no grievance procedure in place for the claimant to avail of and the claimant was not provided with a right of appeal. The respondent has not afforded the claimant fair procedures and the dismissal was therefore unfair.

The respondent, as the employer, failed to show the Tribunal any substantial grounds justifying the dismissal of the claimant. Accordingly, the Tribunal finds that the claimant was unfairly dismissed under the Unfair Dismissals Acts 1977 to 2007 and directs that he be reinstated to his position within the respondent company. As the claimant is being reinstated he is not entitled to minimum notice. Therefore, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

