

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- claimant

MN1556/09

WT669/09

UD1578/09

Against

EMPLOYER

- respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr. N. Ormond
Mr F. Keoghan

heard this claim at Dublin on 27th August 2010.

Representation:

Claimant: In person.

Respondent: XXXXXX

The determination of the Tribunal was as follows:-

During the course of the hearing the claimant withdrew his claim under the Organisation of Working Time Act, 1997.

Claimant's Case:

The claimant commenced employment on 21st May 2008 as a van driver. He was permitted to take his van home after work each day. He worked part time initially and then worked a forty-hour week from 2nd December 2008 to 23rd January 2009. After that his hours of work were almost halved. His hours of work were 5.30 am to 10.00 am. In March 2009 he enquired about returning to full time hours but was told that no extra work was available.

In May 2009 he used the van for his own personal use, as he had to travel to Westmeath.

He was absent from work due to illness on 11th and 12th June 2009. When he got up on 12th June 2009 he noticed his van was missing. He telephoned the respondent and was informed that they had taken the van. He was told he had been abusing the use of the van after working hours.

The claimant found it difficult to arrive for work on time the following week, as he had to use public transport. On 22nd June 2009 the respondent spoke to him about his working hours. The respondent said that if he commenced work at 6.00 am he would only be paid until 10.00 am which was four hours work. His hours were being further cut. He could not deal with this. He felt stressed and sick. He told the respondent that he was returning home because he felt unwell. He visited his doctor that afternoon. He did not contact the respondent in the following days. He furnished the respondent with -a medical certificate covering the period 25th June 2009 to 9th June 2009.

On 2nd July 2009 his P45 together with outstanding holiday money owing were posted to him. He had not received notice of the termination of his employment. His understanding was that the respondent thought he had resigned his position but he had not.

The claimant has not secured work since the termination of his employment. He has been in receipt of the job seekers allowance.

Respondent's Case:

The respondent is engaged in the catering business. It has six vans on the road. The claimant was employed as a driver and commenced employment in May 2008. The claimant was permitted to take the van home after work each day. He initially worked two to three days a week. The respondent increased the claimant's hours to a forty-hour week in the period 2nd December 2008 to 23rd January 2009. The claimant's hours of work were 6 am to 1.30 pm five days a week. Due to the economic downturn the claimant's hours were almost halved after 23rd January 2009 and his new hours of work were 5.30 am to 10.00 am.

In March and April 2009 the respondent had a feeling that there was excessive mileage on the claimant's van. In May he checked the mileage at both the beginning and the end of that month. The claimant should have clocked up 440 kms that month but in fact had clocked up 2110 kms.

The claimant was absent from work on Thursday 11th June and Friday, 12th June 2009. Fridays and Saturdays were the busiest times for the company and the respondent needed the van for deliveries. He tried to contact the claimant but to no avail. He asked an employee to travel to the claimant's home and take the van back. There were a number of boxes of cleaning products in the van at that time and these were left there. He spoke to the claimant about his concerns on Monday, 15 June 2009. The claimant denied using the van for his own personal use. The respondent contended that the claimant was abusing the use of the van and informed him that he could no longer take the van home after work. That week the claimant did not adhere to his rostered hours. On Monday, 15th June 2009, the claimant worked 5.30 am to 10.00 am, on Tuesday, 16th June he worked 6.00 am to 10.20 am, on Wednesday, 17th June 2009 he worked 6.10 am to 9.46 am, on Thursday, 18th June 2009 he worked 6.50 am to 10.00 am and Friday, 19th June 2009 he worked 6.00 am to 9.45 am.

On Monday, 22nd June 2009 the claimant arrived for work at 6.00 am. The respondent spoke to

claimant about his lateness and the told him that it was unacceptable. He then gave him three options of work patterns, (1) 5.30 am to 10.00 am, (2) 6.00 am to 10.30 am or (3) 6.00 to 10.00 am. The claimant then said he had enough of this and left. The respondent's understanding was that the claimant was terminating his own employment. EF witnessed the conversation between the respondent and the claimant that day.

The claimant did not contact the respondent in the following days.

The respondent told the Tribunal that he had not issued the claimant with a contract of employment.

Following the receipt of a medical certificate from the claimant towards the end of June 2009 the respondent issued the claimant with his P45 together with a cheque for outstanding holiday money due to him.

Determination:

The Tribunal carefully considered the evidence adduced and accepts on the balance of probabilities that the claimant purported to resign his position following a discussion on 22nd June 2009 with the son of the respondent claiming that he was experiencing stress as a result of his work environment. It is therefore considered fair and reasonable that consideration should be given to the claimant's conditions of employment, which it was alleged led to the discussion referred to.

It is agreed by the parties that from the commencement of his employment that the hours worked by the claimant varied considerably and that having been originally minimal were increased on 2nd December 2008 until 23rd January 2009 to a forty hour week, were halved from 26th January 2009 to a twenty one hour week, and were finally proposed in the discussion referred to on 22nd June 2009 to be once again, albeit slightly, reduced.

The Tribunal notes that (a) the claimant sought and received medical attention and advice for the stress referred to, (b) that this was not disputed by the respondent and that (c) this was communicated to the respondent prior to their dismissing him. The behaviour of the respondent in dismissing the claimant in these circumstances is considered unfair and unreasonable and is in breach of Section 6(3) of the Unfair Dismissals Act, 1977 as amended by Section 5(b) of the Unfair Dismissals Act, 1993. It is therefore found that the claimant was unfairly dismissed.

In determining the amount of the compensation to be awarded the Tribunal carefully considered the uncontested evidence of the respondent in relation to the unsatisfactory manner in which the claimant was discharging his duties and which related to both time keeping and use of the company vehicle and is satisfied that this behaviour was responsible for adding to the tension and stress that existed between the parties and that this therefore substantially contributed to his dismissal.

The Tribunal awards the claimant €750.00 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal also awards the claimant €270.00 being the equivalent of one week's 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)