

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
MN711/2009
UD692/2009

WT296/2009

- *claimant*

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 N. O'Carroll-Kelly BL

Members: Mr C. McHugh
Mr G. Whyte

heard this claim at Dublin on 12th February 2010 and 3rd June 2010

Representation:

Claimant: Ms. Kiwana Ennis BL instructed by:
Mr. Sean O'Brien, O'Brien Ronayne, Solicitors, 5a Main Road, Tallaght, Dublin 24

Respondent: Mr. David Farrell, IR/HR Executive, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

On the first day of the hearing the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn.

Respondent's Case:

The General Manager (hereinafter FC) of a sister company of the respondent company gave evidence. He was also a Manager in the respondent company. The claimant had previously worked with the sister company but had transferred to the respondent company, which was set up to deal with a specific contract with a beer manufacturer. A 10-year contract was agreed between the parties but this was later revised to 5 years. There were 6 drivers and 6 helpers employed as well as 2-3 in the office and another 1 in the yard area. 1,200 kegs of beer were transported to Dublin daily for distribution by the respondent. A computer system was linked to the beer company in Cork.

The claimant was first employed as a helper but was later trained to be a truck driver. Some time later the claimant and his brother-in-law (who was also employed by the respondent) left the company to set up their own distribution company to distribute bread products.

He met Mr. M of the respondent at a funeral and told him he would be interested in returning to work for the respondent. There were no specific positions available. The claimant again rang Mr. M in 2007 to enquire if there were any positions available. The contract with the beer manufacturer was coming up for renewal and was under negotiation. Indications at the time were that the manufacturer was to extend the area of the contract from 200,000 kegs per year to 300,000 kegs to be delivered. The respondent felt there would be a position for more staff and the claimant was the only person interviewed and a position was offered as part of the management team as Assistant Depot Manager and "right hand man" to Mr. M as they felt he had moved on from personal problems he had had.

He commenced work on July 16th 2007. He had to work a long day and would have to spend 2 hours a day on administration work. As time past it appeared the claimant was able to carry out the job but did not have the experience in line management to carry it out fully. FC said that the company felt undermined but that they felt the claimant could still develop. The claimant could still drive a forklift and had his truck licence so he was still useful to the company. FC told the Tribunal that the claimant was an "overpaid useful person".

A consultant from Cork came up 3-5 times to train the claimant on the computer system. He was also given a step-by-step manual but appeared to have problems using it. Some time later a relative of the claimant's passed away. He was given time off but did not return to work after a week. The claimant's wife was contacted who informed them he had returned to work. He returned but felt "under the weather". He had returned to his "old ways" during his time off. He could not use the machinery and it came to light that he had stopped taking his medication. The claimant was retrained but still could not come to grips with the administration job.

The contract with the beer manufacturer was under negotiation and a further 2 territories were to be added. In February a decision was made to hire a new administration person to support the claimant and who also had knowledge of the 2 new territories (Ms. J.)

In September 2008 it came to light that there was not enough administration work for 2 people. FC informally told the claimant that the other person was to be let go. After time it came again to light that the claimant could not cope with the work. They discussed the matter with the claimant and on FC's return to work from leave he met him. It transpired the claimant had some personal family issues. When asked, FC could not recall if he had told the claimant that he had not "got on top of his role".

FC told the Tribunal that by October 2008 it had become evident that the claimant could not continue working for the respondent. His private life was interfering with his work but no action was taken because of his personal issues. On November 3rd he arrived for work in an unhealthy state and asked to take a weeks leave. On November 9th he contacted Mr. M and said he was seeking medical help for his personal problems. A medical certificate was submitted for a period from November 10th to December 20th. The claimant was expected back to work on December 22nd. The person who had previously worked with the claimant on the administration work was rehired. A decision was made to let the claimant go. The claimant returned on December 30th. FC was surprised to see him and told him they would meet in the New Year for a talk.

FC met with the claimant and informed his that the company had issues with him and felt they had no confidence he could come to terms with the job. He was informed his job was terminated straight away. When asked, FC said that the claimant's personal issues had nothing to do with termination of his employment.

During cross-examination FC reiterated that the claimant held a management position and he was

employed to strengthen the management team. FC was conscious that if their contract with a client was renewed it would mean expanding the business by a further four employees. When the respondent secured the contract another employee (Ms. J) was subsequently employed but her employment was terminated in August 2008. However, it was in her absence that it became apparent that the claimant was missing deadlines. The respondent has service delivery requirements to meet and for this reason the deadlines must be met.

FC confirmed that he held one formal meeting with the claimant but the meeting was about how to help the claimant rather than address the service delivery issues with him. FC did not address the performance issues with the claimant, as the negative outcome on the business was as a result of a crisis in the claimant's personal life.

Claimant's Case:

The claimant recalled that he had attended for an informal interview with FC and Mr. M. FC outlined the operations of the business to the claimant and explained that he wanted someone "who could turn their hand to anything." In his previous employment the claimant held the position of Transport Manager but the claimant was not told at the interview with FC that his role would involve man-management. The claimant's understanding was that he was responsible for office administration and deliveries but he did not understand his title to be that of Assistant Depot Manager. B was the person in charge if Mr. M was on leave.

The claimant suffered bereavement in September 2007 and was absent for a period of one week but when he resumed work he returned to normal duties, such as driving a forklift. He did not see FC for two or three weeks after his return to work. There were no issues raised with the claimant regarding his performance.

In February 2008, the respondent secured the new contract and another employee (Ms. J) was employed due to the increase in paperwork and deliveries. She remained employed until August 2008. When her employment ended the claimant had increased paperwork but he managed it. Another colleague would also give the claimant some assistance.

In October 2008 a delivery was required for a festival. The claimant and a colleague made two deliveries to the festival including an order on Sunday. The claimant injured his back and was absent the following Monday and Tuesday after making the deliveries to the festival. He telephoned Mr. M and they had an exchange of words. The claimant subsequently telephoned FC who reassured the claimant that he would sort the issue out with Mr. M.

On the claimant's return to work he met with FC and Mr. M. FC put it to the claimant that he had been seen on a certain premises while absent on sick leave. As this was true the claimant did not deny it. There were no issues regarding his performance put to the claimant at this meeting.

The claimant subsequently requested one week's holidays from Mr. M to address some personal issues. The claimant also informed FC of his leave. During that week the claimant made a decision to address a personal problem. He informed Mr. M that he would be attending his doctor on 10th November 2008. The claimant entered a residential programme for a period of five weeks on the 14th November 2008. He asked his brother to deliver a letter to his work place from the centre confirming his placement in the centre for a period of five weeks. Mr. M visited the claimant in the centre and informed him that Ms. J had been re-employed to cover the claimant's absence.

The claimant was discharged from the centre on the 19th December 2008. He attended at his workplace and discussed his return to work with Mr. M. The claimant subsequently returned to

work on the 29th December 2008. FC attended at the premises on the 31st December 2008 and the claimant could tell that he was surprised to see him. FC told the claimant that he was meant to meet with him before he returned to work. The claimant was unaware of this. FC said he had employed Ms. J and the claimant said that he understood that was to cover his absence. FC told the claimant that he would discuss the matter with Mr. M.

The claimant heard nothing further until he was asked to attend a meeting on the 7th January 2009 with FC and Mr. M. The claimant was told that in light of where he had been, he would not be trusted again going forward and that he was dismissed. There were no issues regarding deadlines or any other performance issues put to the claimant at this meeting

The claimant gave evidence relating to loss.

During cross-examination it was put to the claimant that his salary was greater than that of other general employees. The claimant stated he had requested that salary at interview. There was no mention at interview of it being a management position. The claimant said that after his previous role as a Transport Manager for a large company, he could perform his position with the respondent with great ease given the number of lorries.

Determination:

The Tribunal considered the evidence adduced at the hearing. It is clear from the evidence that the company mismanaged the dismissal of the claimant. The claimant was not afforded an opportunity to defend himself against the dismissal nor was the opportunity to appeal the decision offered to the claimant. Whilst his employment may have been problematic, the claimant did eventually address his personal issues and it was not until he returned to work having addressed the issues that the respondent dismissed him. There was a serious lack of procedures and gross personnel mismanagement.

The Tribunal finds that the claimant was unfairly dismissed. However, the Tribunal is not fully satisfied with the claimant's efforts to mitigate his loss. The Tribunal awards the claimant the sum of €40,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)