

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

- claimant

UD1274/2009

MN1269/2009

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. K.T. O'Mahony B.L.

Members: Mr. W. O'Carroll
Mr F. Dorgan

heard this claim at Ennis on 19th May 2010
and 19th July 2010

Representation:

Claimant(s) Mr. Paul McGettigan BL instructed by O'Donnell Waters,
Solicitors, Aengus House, Dock Street, Galway

Respondent(s): Mr. Jim Healy, IBEC Mid-West, Gardner House, Bank Place,
Charlotte Quay, Limerick

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant is a 47 year-old married man with three children. He commenced work with the respondent in 2003 as a truck driver delivering tar and gravel to building sites. During his employment he received a telephone call every evening as to where the load had to be delivered the next day. It only happened once or twice in five years that he had not received a call the previous evening.

On the evening of 12 May 2008 he received a phone call from work telling him to report for work around 7.30pm. the following morning to deliver a load of tar to a particular location. On 13 May 2008 on his way to deliver a load of tar a garda stopped him and observed that the truck was not taxed. The garda told him that he should not drive a truck that was not taxed. The garda borrowed

the claimant's mobile to speak to the claimant's employer, but he did not make contact with him. When Director B (the director) returned the call to the claimant's mobile the garda answered the call. Director B indicated that he would have the truck taxed on Friday. The garda told the claimant to produce his driving licence at the garda station and allowed him to drive on. The claimant had been aware that the tax on the truck had expired some six weeks earlier and on five or six occasions he had brought it to the attention of the person on the weighbridge (WB), who said she would inform the director. A few other trucks were not taxed either.

Shortly afterwards, the director phoned the claimant and asked him, "What the f... did you say to the garda". The claimant told him that he had said nothing. The director was not in a very good mood. He told the claimant that he had spent €10,000.00 to € 15,000.00 taxing trucks the previous week and could not afford to tax his. He then told the claimant to "F... off home and stay there". The claimant understood that he had been dismissed by the director. When he delivered the tar he told the foreman of the gang laying the tar that he would not be returning as he had been dismissed. The respondent also employed these men. The claimant delivered the tar because otherwise it would become solid and unusable. The claimant denied that he abandoned his job or that he was told to park the truck until the tax was paid. He did not misinterpret what was said to him.

He drove the truck back to the quarry, parked it and went home at around 1.00p.m. Because of the time of day there was no necessity for the truck lights to be on and if they were left on it was not intentional. Although he had spoken to his wife on the phone a few times that afternoon he waited until she returned from work at around 4.30pm to tell her he had been dismissed. He was hoping that things might calm down and that the respondent might phone about work the following morning, as was the practice. He did not receive a call from the respondent. When he tried to use his mobile he discovered that his calls had been blocked. That evening CW took their son to a football game at 6.30p.m. While out she tried to call the claimant on his work mobile to ask if he had received a call but she failed to get through. The respondent could have contacted him on his landline. His wages were paid into his bank account. The respondent never contacted him again.

The claimant contacted the HR manager (HRM) requesting his P45 for Social Welfare and he received it by post. His wife (CW) is the director and main shareholder in a company involved in laying tar. Six weeks after his dismissal he worked for her company for three to four weeks and then signed on with Social Welfare again. He applied for a FAS course on a local community scheme for twenty-two hours a week and put flyers in a shop.

On 21 May CW phoned HRM in payroll and asked if there was any mention of the claimant's holidays, redundancy or notice. HRM told her she had been told to send the claimant his P45 and 2.5 day's holiday pay. CW worked in an open-plan office and the two girls working beside her heard the contents of the phone call.

He was delighted to have a job. He owed money to the company but others owed more than he did. Every month he received a statement of his debt to the respondent. Three to four weeks before the incident the director raised it with him and he told him that he would pay him when he had the money. The director was not too civil about it. He did not think that he could use the grievance procedure. During the course of his employment with the respondent the claimant had only three or four days absence and when he was sick CW notified the respondent.

Respondent's Case

A director and shareholder of the respondent (the director) told the Tribunal that he had no problem with the claimant's work. He was a large employer with a large number of trucks. It is difficult to keep track of tax on trucks. It costs €2,500 to tax a truck for twelve months. He had never spoken to a garda before in relation to this matter.

On 13 May 2008 he received a call from the office to contact the claimant. When he called the claimant's mobile a gardai answered it. He assured the gardai that the truck would be taxed by the following week. A short time later he phoned the claimant to ask what he had said to the gardai. He spoke to the claimant about paying his account. He told the claimant to bring the lorry back to the quarry and park it up. He was incensed that the gardai had answered the mobile and his conversation with the claimant was heated. He did not dismiss the claimant. He did not tell him to "f... off home and stay there". If he had dismissed the claimant he would have gone to collect the truck.

When he went to the yard where the trucks are parked he saw the claimant's truck there with the window open, the key in the ignition, the lights on and the cover on. The person in the weighbridge (WB) did not know where the claimant was and he had not clocked out. The director assumed that the claimant had walked off the job because he had mentioned the money owing to the respondent. Director was adamant that he did not terminate the claimant's employment. He felt that the claimant had abandoned his job and there was no point in contacting him. Up to this point he had a good relationship with the claimant.

The director agreed that he had said to the claimant "What the f... did you say to the garda?". He had never had to talk to a garda in eight to nine years. He thought that the claimant told the garda to contact him. The claimant was not legally obliged to hand over his mobile phone to the garda and he should not have given him the telephone. He had told the claimant to park the truck until he (the respondent) had taxed it. He told the claimant if he had paid his bill that there would be no problem taxing the lorry.

He did not know who blocked the claimant's mobile number. He did not give a direction to cut off the claimant's mobile. It had not been cut off for a number of weeks. As far as he was concerned the claimant had left his job. If the claimant had personal issues he (the witness) was available on the mobile phone all day. He was not surprised when the claimant did not report for work the next day. He had no idea where the claimant was supposed to deliver to on 14 May. The director would have tried to telephone the claimant and an attempt was made to contact the claimant. He did not regard the incident as a disciplinary issue.

WB who works in the weighbridge and organises the deliveries told the Tribunal that on the morning of 13 May the director told her about the incident with the gardai and that the truck was to be parked up and another made available. She tried to telephone the claimant at around 1.30p.m. but got no reply. Later that evening when she was doing the schedule for the following day she again tried to phone the claimant but his mobile went to the answering machine. If she did not contact the employees about their work for the next day they would still report in. She expected the claimant to work the next day.

On two or three occasions the claimant had mentioned to her that his truck was not taxed and she

told him to mention it to the director. It was not her job tax the trucks. It did not concern her that an employee was on the road with a truck that was not taxed. She did not have the claimant's landline number but accepted that she could have checked it out. She did not phone the claimant when he failed to turn up for work because she had to get a driver straight away as a load of tar was mixed for delivery. She insisted that she had made the calls to the claimant. She did not have the phone records with her. She believed that management had them. WB is the wife of the director.

The HR Manager told the Tribunal that the director would have instructed her to issue the claimant with a P45 had he dismissed the claimant and he had not done so. The claimant phoned her on 19th May asking for his P45 for Social Welfare and told her that the director told him "to park up the lorry and stay at home". She made a note of their conversation as the claimant was speaking and put it on his personnel file. She only takes note of unusual conversations. While she mentioned the request for the P45 to the director she did not mention that the claimant had said that he had been told to stay at home. The director told her to issue the P45 to him if he needs it. She had no recollection of speaking to the claimant's wife. It is company policy not to speak to a third party. She did not mention the grievance procedure to the claimant during their phone call.

By letter dated 15 June 2009 the claimant's solicitor indicated to the respondent that a claim for unfair dismissal was being brought. Over the course of subsequent correspondence between the solicitor and the respondent's financial controller (FC) (who was also responsible for administration and to some extent for HR) each side's position was reiterated and the respondent repeatedly alleged that the claimant's attitude and behaviour leading up to this departure was "a cynical attempt to manufacture a claim against the company in order to extort money under a guise". FC based his conclusion on the sharp fall in the claimant's earnings in the first 21 weeks of 2009 as compared with the same period in 2008, and the money owed by him and his wife to the respondent. In his letter of 17 July 2009, FC having reiterated in full the respondent's position, informed the claimant that his job was still available and gave him until 23 July to contact the respondent. By letter of 1 September 2009 the claimant's solicitor sought the full reinstatement of the claimant to his former position. The respondent was only willing to pay for hours worked. He requested that the claimant should contact the director directly within seven days of the date of the letter to discuss his resumption or otherwise the respondent would regard the claimant's departure as permanent and fill the position. FC had discussed all correspondence with the director before it issued. As far as FC was aware the claimant had not complained about the fall in his wages. Nor had the claimant invoked the grievance procedure in relation to this fall in earnings. FC felt that anyone in dire financial straits would return to work despite the allegations he (FC) had made. He still felt that the claimant had manufactured a claim. He did not know who checked the phone records and he was not involved in having the claimant's mobile cut off. The claimant had behaved provocatively in leaving the lights on in the truck, the windows open and the doors open.

Determination

Dismissal was in dispute in this case. While it is common case that the director told the claimant on 13 May "to park up the truck" there is a dispute as to whether he further told the claimant to "f... off home and stay there".

In order to determine whether there had been a dismissal on 13 May the Tribunal must ask itself two questions. Firstly, whether the director uttered the disputed words to the claimant. Secondly, if those words were uttered whether it was reasonable for the claimant to understand them to be words of dismissal. Taking into account the director's admission that he was incensed with

the claimant on 13 May, that he had used bad language and raised the matter of the debt that the claimant owed to him. The Tribunal on the balance of probability accepts the claimant's version of the conversation on 13 May 2009. The Tribunal is further of the view that the failure by the director, CW and HRM to make any contact with the claimant the following day or days when he did not report for work is more consistent with its finding that the alleged words had in fact been uttered by the director. In reply to its second question the Tribunal, having accepted that the words in issue were uttered, finds that it was reasonable for the claimant to construe those words as a dismissal. Accordingly, the Tribunal is satisfied that there was a dismissal. As there were no grounds to justify the dismissal and respondent failed to apply any or any fair procedures to the dismissal the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal notes that the respondent offered the claimant the opportunity to return to work but having regard to the allegations made and repeated against him in the correspondence between the parties the Tribunal finds that it was not unreasonable for the claimant to decline the offer in all the circumstances.

The Tribunal awards the claimant compensation in the sum of €39,000.00 under the Unfair Dismissals Acts, 1977 to 2007 Acts.

As the claimant's employment was terminated without notice he is entitled to compensation of €2,200.00 being the equivalent of four weeks' gross 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)

