

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-claimant

CASE NO.
UD1453/2009
MN1433/2009

against

EMPLOYER
-Respondent

Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms V. Gates B.L.
Members: Mr C. Lucey
Mr F. Barry

heard this claim at Dublin on 12th October 2010
and 9th February 2011

Representation:

Claimant: Mr. Liam Bell B.L. instructed by Mr. Tim O'Sullivan
Mooney O'Sullivan, Solicitors, 7 Orchardstown
Park, Rathfarnham, Dublin 16

Respondent: On 12th October 2010, Mr. Brendan McDonald Solicitor,
Coughlan White O'Toole, Solicitors,
Moorefield Road, Newbridge, Co. Kildare
On 09th February 2011 Mr. Conor O'Toole Solicitor
Coughlan White O'Toole, Solicitors,
Moorefield Road, Newbridge, Co. Kildare

CLAIMANT'S CASE:

The Claimant gave evidence that he commenced employment with the Respondent in September 2004 and was assigned work in the Accounts Office. In and around March 2006, the Claimant transferred to the Respondent's new Plant in Ballycoolin where he was responsible for the running of the Plant. The Claimant was responsible for taking orders, batching concrete, liaising with drivers and other matters pertaining to the smooth running of the Plant. The Claimant liaised with both VA and the managing director (hereinafter referred to as JK) and was most often in contact with VA, the Quality Controller.

The Claimant did not receive a Contract, Terms and Condition of Employment or a copy of the Respondent's grievance procedure. At a minimum, the Claimant worked from 7.00 a.m. to 6.00

p.m. from Monday to Friday and 7.00 a.m. to 1.00 p.m. on Saturdays. If a customer required a late or early pour of concrete, then the Claimant worked extra hours. The Claimant said that he had no breaks or no designated lunch hour whilst working at the Ballycoolin Plant.

The Claimant said that if one of the Drivers had a grievance, they came directly to him and he relayed the difficulty to VA or JK. There was no HR Department within the Respondent Company. The Claimant said that initially he had a good relationship with JK but, if an incident did occur, the Claimant felt that JK over-reacted. The Claimant said that the relationship between himself and JK gradually broke down and gave a number of incidents highlighting the breakdown in the relationship. In January 2007, the Claimant said that he took an extra annual leave day for a funeral, which had been authorised by VA. However, on the day, JK telephoned the Claimant and said "Why are you not here, get in here now". As a result, the Claimant was obliged to attend work.

In July 2007 the Claimant went to the Doctor with a serious condition, which required the taking of an ECG. A Driver from the Respondent Company brought the Claimant to the Doctor directly from the Plant. The Claimant had asked VA to cover for him prior to going to the Doctor. When at the Doctor's Surgery, the Claimant received a text to the effect that JK was not happy as the Claimant was taking too many sick days and that he did not agree with an employee having sick days. The Claimant said that it was as a result of stress and over-work that he got so sick and consequently was certified for one week off work. On the following day, JK rang the Claimant and requested that he return to work immediately, which the Claimant did.

In October 2007, the Claimant fell down the steel steps in the office and had to be taken to hospital by one of the Truck Drivers. The Claimant was given a Medical Certificate for one week. On the following day, JK phoned the Claimant and instructed him to come to work immediately as he had an automatic car and was, therefore, in a position to drive. JK offered to provide a box so that the Claimant could raise up his injured leg.

In November 2007, the Claimant and another member of staff were operating a split shift. At every shift changeover, the Claimant and the other staff member had a brief talk to up-date each other on the progress of work. JK shouted at them during one of these changeover talks saying, "if there is time for two people to talk, there is not enough work. I'll have to let one of you go". The Claimant informed JK that they had just been having the usual shift changeover talk, to which JK said, "stop being a martyr, there is not enough work if you're talking".

In July 2008, the Claimant felt weak at work and was sent home by VA. When the Claimant attended his Doctor, he was told the he had an irregular heart rate and was given a Sick Certificate of one week's duration. On the following day, JK rang the Claimant and insisted that he return to work, which the Claimant did.

In November 2008, the Claimant discovered that he had blood in his urine. He asked VA to cover for him whilst he attended his Doctor. The Claimant was given a Sick Certificate for three days duration. JK was unhappy that the Claimant was off work and said he was taking too many sick days. The Claimant said that he felt unwell as a result of overwork, long hours and no normal breaks.

On Sunday, 21st June 2009, the Claimant felt ill but went to work as normal on Monday morning. The Claimant informed JK that he had been referred to a Consultant and that the appointment was during working hours but that he would endeavour to get a later appointment. The Claimant

collapsed at home on the morning of 24th June 2009 and was taken to hospital. The Claimant's wife informed VA that the Claimant could not attend work as he was in hospital. The Claimant was sent for blood tests and, whilst at hospital, JK phoned the Claimant whose mother answered the call. The Claimant said that he rang JK twice that day but failed to reach him. When JK again rang the Claimant, the Claimant thought that JK needed clarification about an Order. The Claimant said that JK said, "What's the problem now, Tom". The Claimant said that he told JK that he had already discussed the situation with VA telling him about his collapse and the necessity for blood tests. The Claimant said that JK asked when he would be coming back to work. The Claimant explained that he would have to wait and see what the test results were and what the Consultant recommended. The Claimant said that JK said "sick days don't exist" and "you know my feeling on sick days, you have to get back to work". The Claimant said that he said to JK "it's not a picnic for me", to which JK replied "stay the f*** home for good, I don't want to see you about the place again" and hung up. The Claimant said that JK was shouting throughout the course of this conversation. The Claimant believed that his employment had been terminated by that phone call. Accordingly, the Claimant returned his work vehicle and the Company money in his possession forthwith.

Thereafter, the Claimant received a letter from the Respondent Company suggesting that his job was still available, even though his job was advertised on the Internet in July 2009. The Claimant gave evidence of loss.

CROSS EXAMINATION

The Claimant was questioned as to whether or not he interpreted the conversation with JK appropriately. The Claimant said that he was sure that his employment had been terminated as, in the course of all the other heated arguments, which he had had over the years with JK, he had not been told not to return to work. In answer to questions, the Claimant said that he spoke to JK on a daily basis regarding a variety of work issues. The Claimant said that he was instructed not to leave the office so, therefore, he never had an opportunity to take a proper lunch break. The Claimant denied that he ever handled Contracts or was ever asked to give advice on the signing of Contracts by other employees. The Claimant said that he reported directly to VA or to JK if he was sick and always provided Medical Certificates on the occasions that he was sick. The Claimant said that he always returned to work, even though he had a Sick Certificate, because he was in constant fear that he would lose his job if he did not do so. The Claimant denied that he left his job voluntarily. The Claimant said that VA was aware that the Claimant had an appointment with a Consultant. The Claimant said that he never hung up on a conversation with JK; it was JK that hung up on him.

TRIBUNAL CLARIFICATION:

The Claimant submitted his Medical Certificates to Head Office. An administrator (VR) located in Head Office took delivery of the Company vehicle and the money when the Claimant returned the same. The Claimant said that, in total, he had two Medical Certificates for one-week duration and one Medical Certificate for three days, none of which he availed of in their entirety. The Claimant said that he had five days sick leave over the entire period of his employment.

SECOND DAY OF HEARING EVIDENCE:

The Hearing resumed on 9th February 2011, with the Claimant having the same Legal

Representative as on the first Hearing Date and the Respondent having a different Legal Representative, albeit within the same Solicitor's Office. An issue arose as to whether or not the cross-examination of the Claimant had concluded at the last Hearing Date. The Respondent's Representative initially maintained that the Claimant was still under cross-examination and that, therefore, he was entitled to continue to cross-examine. The Claimant's Legal Representative maintained that cross-examination had concluded and that, therefore, it was unfair to allow further cross-examination. The Respondent's representative then asserted that he wished to continue with cross-examination in order to put questions which had not been put to the claimant in the course of cross-examination by his colleague. The Respondent's Representative said that he had originally been instructed by the Respondent Company but was not available to attend at the first day of the Hearing and his colleague had filled in for him. On the second day of the Hearing, his colleague was not available and, therefore, he himself was in attendance.

Having consulted its combined notes and those of the Secretary to the Tribunal, the Tribunal confirmed that cross-examination of the Claimant had, in fact, concluded on the last Hearing Date and determined that the Respondent's Representative was not entitled to continue to cross-examine for the purposes of putting further questions which he felt had not been put in the course of a full and concluded cross-examination. In the opinion of the Tribunal, to re-open cross-examination on the grounds that the Respondent's representative wished to cross-examine because he had not been in a position to attend at the first Hearing Date and, therefore, wished to put questions which he believed were appropriate and had not been put by his colleague, was unfair to the Claimant, particularly given the inherent difficulty that the Respondent's Representative had not been present for evidence in chief or, indeed, for a fully concluded cross-examination.

The Respondent's Representative indicated that the Respondent wished to withdraw from the case on the basis that there was to be no re-opening of cross-examination. At this stage in the Proceedings, the Respondent's Representative stated that the Respondent wished to rely on "fresh evidence" which had come to light following an internal investigation within the Respondent Company following the last Hearing Date. The Respondent's Representative stated that the said "fresh evidence" was in relation to the behaviour of the Claimant prior to the date on which he left the Company on 24th June 2009. Following questioning by the Tribunal, the Respondent's Representative confirmed that what he was describing as "fresh evidence" related to the matters set out at paragraph 13 of the non-completed T2 Form which has been submitted to the Tribunal and to the Claimant's Representative, that is, "it is not denied that the Company raised matters with the Claimant in relation to his management of employees having noted the Claimant spending a lot of time talking and not attending to his duties". The Claimant's Representative submitted that on the first Hearing Date, the Respondent's Representative based his cross-examination of the Claimant on the aforesaid document and that it had been put to the Claimant that he had spent a considerable amount of time talking with other employees to the detriment of his duties.

Having again consulted its combined notes, the Tribunal was satisfied that in the course of cross-examination, the Claimant had, in fact, been questioned in relation to his failure to attend properly to his duties and that, accordingly, this issue did not constitute "fresh evidence" but was a matter on which the Claimant had already been cross-examined. Having given full consideration to all the issues involved and in ease of the situation, and mindful, inter alia, of the intention that there be some degree of informality in Tribunal Hearings, the requirement to give each party a fair Hearing and the cost implications for both parties, the Tribunal proposed to proceed with the Hearing as follows:

A. Allowing the Claimant to call his additional Witnesses with consequent cross-examination:

B. Allowing the Respondent and his Witnesses to give evidence, including any of the so-called “fresh evidence”, with the consequent cross-examination by the Claimant’s Representative:

C. Allowing the Claimant’s Representative some time to take instructions if necessary on any of the “fresh evidence” adduced by the Respondent’s Witnesses:

D. If in the opinion of the Tribunal, it felt that evidence in relation to the claimant’s behaviour needed further clarification, the claimant would be further recalled for further cross-examination.

The Claimant’s Representative indicated that such proposals were acceptable. The Respondent’s Representative stated that he was instructed by the Respondent Company that if the Hearing did not proceed with the re-opening of cross-examination, then his instructions were to withdraw from the Hearing. The Respondent and their representative withdrew from the hearing. Accordingly, the Representative for the Claimant indicated that he did not wish to call any more Witnesses and made a brief closing statement. The Tribunal heard submissions as to the Claimant’s loss and mitigation of loss.

DETERMINATION:

Having heard the evidence of the Claimant, the cross-examination of the Claimant and the evidence and submissions of both parties following clarification of issues by the Tribunal, the Tribunal determines that the Claimant was unfairly dismissed. The Tribunal determines that compensation is the most appropriate remedy having regard to all the circumstances. Accordingly, the Tribunal awards the Claimant the sum of €70,000.00 under the terms of the Unfair Dismissals Acts, 1977 –2007.

The claim under the Minimum notice and Terms of Employment Acts, 1973 to 2005, succeeds and the Tribunal awards the claimant the sum of €2,225.14, this being two weeks gross pay as compensation in lieu of notice.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)