

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

**EMPLOYEE– *claimant***

UD2361/2010

RP3169/2010

MN2303/2010

Against

**EMPLOYER – *respondent***

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. D. Winston  
Mr. A. Butler

heard this claim in Dublin on 12<sup>th</sup> April, and the 11<sup>th</sup> June and 12<sup>th</sup> June 2012

Representation:

Claimant: Mr. Michael McNamee B.L. instructed by Mr. Maurice Walsh, Lacy  
Walsh, Solicitors, 77 Strand Road, Sandymount, Dublin 4

Respondent(s): Ms Cliona Kimber B.L. instructed by Mr Joseph Ritchie, Donal M.  
Gahan, Ritchie & Co, Solicitors, 36 Lower Baggot Street, Dublin 2

### **Background**

The claimant was an electrician for the respondent and went sick in mid 09. The respondent's case is that while the claimant was off sick, he was driving a taxi and for this reason he was dismissed for gross misconduct. The claimant's case is that he was allowed by the respondent to drive a taxi outside working hours and this did not constitute gross misconduct

### **Respondent's Case**

The CEO told the Tribunal that he joined the respondent in February 2011. It was not true that the claimant had an unblemished record. The claimant received a first written warning regarding driving a taxi during working hours on the 12<sup>th</sup> August 2005. An agreement that was to be signed off on in this regard in June 2005 but it was not signed by the claimant. An issue was raised regarding the claimant's timekeeping and a meeting was convened for the 12<sup>th</sup> June

2009. The meeting did not go well and a number of colleagues complained about the behaviour of the claimant at the meeting. The claimant was sent home by the former MD. The claimant arrived in the office unannounced on the 16<sup>th</sup> June 2009. On the 17<sup>th</sup> June 2009 a letter issued to the claimant outlining an allegation of aggressive behaviour on Friday 12<sup>th</sup> June 2009. The claimant was not wearing his uniform and protective equipment. The claimant was suspended by the former MD, the claimant was very upset. An investigative meeting took place on the 24<sup>th</sup> June 2009 and the claimant did not attend. Employees who were not able to undertake their duties could undertake alternative duties. The claimant did not ask to do reduced hours. The claimant was paid sick pay by the respondent for two to three weeks.

In a letter dated the 4<sup>th</sup> January 2010 the claimant was informed that he would be invited to an investigative meeting within the next seven days. An investigative meeting took place on the 20<sup>th</sup> January 2010 but no minutes are available. He looked for the minutes but could not locate them. Correspondence issued between the claimant's representative and the respondent's representative in March, April and May 2010. A disciplinary meeting took place on the 5<sup>th</sup> May 2010. Present at the meeting were the claimant, his solicitor, the former MD and the solicitor for the respondent. The claimant was asked if he was driving a taxi and the claimant replied no.

In a letter dated 27<sup>th</sup> May 2010 the claimant was informed that he was summarily dismissed as he worked as a taxi driver whilst on extended sick leave from the respondent in November 2009. An appeal hearing took place on the 25<sup>th</sup> August 2010. The decision to dismiss the claimant was upheld.

In cross examination he stated that he was not involved in the decision making process. He was aware that the warning that the claimant received in 2005 had expired two years after that. Taxi driving was an issue in 2005. When put to him that the respondent sought to regulate the claimant's actions he replied it was unsigned. He agreed that the claimant suffered from anxiety and stress in 2009. The claimant was ill and the doctor recommended not bringing him back to work as he was under stress but he was driving a taxi. The respondent had a record in 2005 that the claimant was driving a taxi. The medical advice did not suggest that the claimant should return to work on alternate dates. He agreed that there was nothing to indicate if the claimant's driving hampered his activities or exacerbated his condition.

In answer to questions from the Tribunal he stated that no one knew that the claimant was a driver someone told the respondent that the claimant drove a taxi. This occurred earlier than the 4<sup>th</sup> January 2010. The respondent did not want him to work as a taxi driver. When put to him that in 2005 that the respondent was aware that the claimant drove a taxi and why four years later that the respondent checked to see if he was driving a taxi he replied he did not know it was only speculation. The claimant was unfit to work due to stress.

The second witness for the respondent, the senior projects manager told the Tribunal that in May 2000 she managed some of the respondent's projects. She was responsible for the day today operations of the respondent. A landlord appointed the respondent to manage a number of office buildings. She liaised with the claimant regarding the electrical element and the claimant was assigned to a specific building. On the 12<sup>th</sup> June 2009 a meeting took place. She had taken on the management of two buildings and was monitoring proceedings. She observed the claimant in one building on a number of occasions without her knowledge in some cases. The claimant had a difficulty in wearing a uniform and he did not like to wear the full uniform. She was the health and safety officer. An instruction reissued to employees

regarding the wearing of the uniform, safety boots, hard hat and reflective vest. The claimant had an issue with wearing safety shoes and he did not think that he should have to wear them indoors. Present at the meeting on the 12<sup>th</sup> June 2009 were the claimant, another electrician, the facilities manager and JB former MD. The claimant lunged off his seat and asked her where this was documented. She was seven and a half months pregnant and she was shocked. She felt that the claimant invaded her space and he was aggressive. The claimant was always very hottempered. She had to leave work and she returned two days later. She was upset due to the behaviour of the claimant. She lodged a formal complaint about this matter.

In cross examination she said that she had no discussions with the claimant about this matter. She was health and safety officer for all staff.

### **Claimant's Case**

The claimant's GP told the Tribunal that he had been the claimant's GP for more than five years. The claimant attended his surgery in June 2009. The claimant was suffering from acute stress and he was suspended from the respondent. On the 16<sup>th</sup> June 2009 the claimant went to work and was suspended on full pay. He prescribed a low dose of valium and low dose sleeping medication for the claimant. The respondent's doctor contacted him on the 14<sup>th</sup> September 2009. The claimant's GP saw the claimant on the 14<sup>th</sup> September 2009 and the claimant had returned to work. He diagnosed the claimant as being very stressed and depressed. He recommended medication for depression as well as other medications. The claimant suffered side effects from the depression medication and he prescribed alternative medication for him.

He reviewed him in September/October 2009. He undertook blood tests and there was no evidence of an acute medical condition. The claimant told him he was very stressed. There was no significant progress in his condition and it remained relatively unchanged. He was asked to issue a certificate that the claimant was fit to drive in April 2010. He was not fully aware if there was an issue with the claimant driving a taxi vis a vis work. He told the claimant he was fit to drive. The claimant told him that he had significant on-going difficulties with returning to his previous place of work and he did not judge that he was fit to work outside of that. He was not aware that the claimant was physically unfit to work elsewhere. He helped the claimant with work related stress. The claimant's stress was job specific based on what the claimant had told him.

The claimant is currently undergoing treatment for cancer, his prognosis is excellent and he is responding well to treatment. In a two week period January to February 2011 the claimant had a circumcision. He felt that the claimant was fit to seek work after a four week period.

In cross examination he stated that the claimant was first diagnosed with cancer in early December 2010. The claimant had a very big issue with workplace stress. He felt if the claimant had the opportunity to move to a different area in the respondent that would have helped him. He was not aware that the claimant was doing two jobs since 2005 and he was not aware that the claimant was driving a taxi. The claimant did not tell him he was doing two jobs. He could not say if the fact that the claimant was doing two jobs caused him stress as he did not have this information. He was very reluctant to make a comment on the claimant's taxi driving. He stated driving late at night in the city is very stressful. On the 16<sup>th</sup> June 2009 the claimant went to work and was advised he was being suspended on full pay.

The claimant told him he did not know what this was about and he had consulted a solicitor. He did not have the sequence documented and he made notes at the time. The claimant told him a formal complaint had been made against him. He had no recollection of the claimant telling him that he was suspended for being aggressive. He had not documented that the claimant was told to go home and calm down on the 15<sup>th</sup> June 2009. He did not have information that two jobs caused the claimant to be stressed and consult his GP.

In answer to questions from the Tribunal he stated that the claimant was better to be away from the job. Having depression does not prevent a person from working. The medication he prescribed for the claimant was very low dosage. It would be important for him to know if an employee was trying to balance a second job with the day job.

The claimant told the Tribunal that he joined the respondent in October 2001. He submitted his CV to the respondent and that included his hobbies. It referred to driving that he did in 2001. From 2001 to 2005 everything went well for him and there were no complaints. There was an issue in 2005 with him driving a taxi. He had a taxi and was able to use the bus lanes to travel to and from work. One day a colleague observed him driving with a taxi plate and reported it to the respondent. Everyone in his workplace knew that he had a taxi. He was informed that he was not to go near his work place with a taxi sign. He maintained that there was no objection to him driving a taxi and it did not interfere with his job with the respondent. In the mornings he had the taxi plate on his car and after 2005 once he got near to his workplace he removed it. He undertook taxi work on Saturdays.

In 2009 he was double jobbing. He started work with the respondent at 8.30a.m. and finished at 5.30p.m. He was on call with the respondent for twenty four hour call out. If he received a call from the respondent he would have to make himself available. The taxi business was always low key and he lived in Naas and used his taxi to travel to work. He was an electrician for thirty years and he queried the credentials of his colleague Mr. D to undertake work as an electrician. The claimant stated that Mr. D did not have a clue what he was doing. He left his house at 6.45a.m. to get to work for 8.30a.m. He got home from work at 7.30p.m. On Saturdays he went to Dublin with his wife and drove a taxi for a few hours.

He had been given a document in 2005 to outline his activities he had regarding outside employment. The respondent knew about his taxi in 2005 and as far as he was aware he did sign the document.

In June 2009 a complaint was made against him. Prior to that he objected to certain things happening regarding a colleague Mr. D purporting to be an electrician. Health and Safety issues were not adhered to regarding emergency lighting. He tried to assess the system and it did not work. He took this matter on board, he compiled a report and submitted it to the respondent. He contacted the office and asked the respondent what it was doing with the whole system, he queried the respondent if it had certification for it. He was told the respondent would revert to him. AO'N was the Health and Safety officer and he denied that he was aggressive to AO'N.

In relation to his appeal the issue was that he was asked was he driving a taxi while ill and nothing else was put to him. He recalled that he was asked a specific question about driving. He occasionally drove a taxi at weekends. The respondent placed him under surveillance and this was an invasion of his family and privacy. He was attending the doctor at this time and it was very stressful.

He was suspended in June 2009 when an investigation took place. For three to five weeks the situation was in limbo. He went to work one morning and was told to go home, he was told he was suspended on full pay and he left the premises. On the way home he received a telephone from the respondent regarding a document. He had made appointment with his Doctor.

He was not on paid leave for two weeks. There was no mention about a phased return to work. He attended the company doctor on the 10<sup>th</sup> September 2009 and she asked him what the problem was. He had blisters on his feet and went to HR. There was no discussion about him driving a taxi. The doctor told him to return to work in two week's time and she asked him about his work environment. He was totally stressed out in work.

He went through the grounds of appeal. He was not sure if he spoke at the appeal meeting. No one in the respondent asked him if he was fit to drive a taxi. He discontinued driving a taxi in December 2009/January 2010. He recommenced driving a taxi after he lost his job. He did some taxi work to keep afloat. He was on disability benefit for two years since September 2009.

He endeavoured to obtain employment, he looked on the website. He attended two interviews and did not progress any further.

In cross examination he stated that he had experience as an electrician and was competent in lock repair and general maintenance. The general pattern from 2005 to 2009 was he drove to and from work by taxi and collected fares occasionally. He also undertook some taxi work on Saturdays. When asked if the pattern of his driving changed while on Disability Benefit he replied he was working on extra occasions. He could have worked three nights, five days and there was no pattern to it.

He discontinued driving the taxi when he received a notice regarding breach of contract. It could be around January 2010 when he ceased driving a taxi. He then stated that from January February 2010 he did not cease driving a taxi, he drove his taxi when he needed the funds. It could be twice in three months or three to four nights per month. He gave his earnings for 2009 to 2010 to his accountant

He did not have to take whatever fare he was offered and he could tell a prospective customer he had a prior engagement. The only reason he used the taxi plate was he could take the bus lane to work. He could not take a fare if it meant he was late for work. He was not late for work in the respondent. He worked seventy, eighty and ninety hour weeks over a couple of years.

He did not tell his GP that he was driving a taxi. He never worked for a cab company called HC. He attended a meeting on the 12<sup>th</sup> June 2009 in the respondent. He was in the office on the 16<sup>th</sup> June 2009 and he was told he was suspended. He received a letter dated 17<sup>th</sup> June 2009 regarding his suspension. He went to a solicitor before he went to his GP. There was no answer to his complaints and he knew he was going down a one way street. He raised a query with the respondent in relation to Mr. D's qualification and he received a response.

He registered with an employment agency on the 17<sup>th</sup> June 2009 as he could see the way things were going in the respondent. Redundancies were being implemented in the respondent.

The meeting of the 12<sup>th</sup> June 2009 took place out of the blue. He was suspended on the 17<sup>th</sup> June on full pay. When his disability ceased it came to his attention that he could be liable for monies received for disability benefit because he was doing taxi work. He did not tell Social Welfare he was driving a taxi. He agreed that the employer had to know the correct situation.

He would have informed his solicitor that he had alternative employment. He had two operations one in February 2011 and one in November. He forwarded his CV to jobs alert. He did not register with FAS

When he was asked if it ever occurred to him to drive a taxi for seventy hours a week after he was dismissed he replied that he was hopeful that he would get a job.

### **Determination**

The Tribunal carefully considered all of the evidence adduced and the submissions made.

It is common case that difficulties were present in the relationship between the parties prior to the dispute. The Tribunal does not apportion responsibility for these difficulties.

The assertion of the respondent is that the claimant was responsible for behaviour in the course of his employment which it alleges amounted to gross misconduct. This behaviour the respondent alleges consisted of the claimant (a) engaging in work as a taxi driver while on certified sick leave and (b) lying when this was brought to his attention. In response the claimant asserts that while he was working as a taxi driver that he was certified fit to drive, additionally he denies that he lied and finally he submits that the response of the respondent in dismissing him was disproportionate.

Before the hearing of any evidence the respondent applied for a declaration pursuant to Section 7 (2)(c) of the Unfair Dismissals Act 1977 which was opposed by the claimant. The Tribunal considered and refused the application. To have granted the application the Tribunal would in effect have precluded itself from hearing the evidence of the parties which it is required to hear so as to determine the validity or otherwise of the claimant's claim.

The Tribunal gave consideration to the procedures followed by the respondent in (a) investigating the claimant and (b) in disciplining him. While certain aspects of these procedures were unsatisfactory the Tribunal is satisfied that they were of insufficient consequences so as to invalidate the process.

In considering the evidence of the parties the Tribunal found certain aspects of the claimant's evidence to be lacking in both coherence and credibility. It was therefore unconvinced by it. The Tribunal is satisfied that (a) that the action of the claimant in working as a taxi driver while certified unfit to work was deliberate (b) that he failed to communicate this to the respondent and (c) when this was alleged by the respondent that the claimant denied it.

It is the view of the Tribunal that when a matter of the nature of an employee working while certified unfit to work arises that it places an onus on the employee to clearly and satisfactorily explain and justify this and in so doing to seek to establish that his action has not undermined or damaged the relationship of trust that is inherent between an employer and employee.

The Tribunal is satisfied that the claimant has failed to discharge this onus and in so failing has not satisfactorily addressed the breakdown in the relationship of trust that had taken place as a result of his action which it finds and determines has taken place. It is further determined that this breakdown was of such consequence so as to sunder the relationship between the parties. Since responsibility for this rests with the claimant it is therefore found and determined that the claimant was guilty of gross misconduct and that his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

No evidence was presented in relation to the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the claim fails. The claim under the Redundancy Payments Acts 1967 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_

(CHAIRMAN)