

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - **Claimant**

UD1739/2010

MN1687/2010

WT775/2010

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 E. Kearney BL

Members: Mr T. Gill
Ms H. Murphy

heard this claim at Galway on 28th March 2012

Representation:

Claimant(s): Ms Dawn Carney, Sheehan & Co, Solicitors, Augustine Court, St Augustine Street, Galway

Respondent(s): Mr Alistair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

Respondent's Case

The respondent is a transport company that delivers goods to shops throughout Ireland. Witnesses for the respondent, (RG) transport manager, and (JMcG) director, gave evidence on behalf of the respondent. The Tribunal heard evidence that the claimant commenced working for company (R) in September 2005. This company was purchased by the respondent and the claimant continued working in the same capacity, as a truck driver for the respondent. He was employed on a specific route and worked 4 days per week from Monday to Thursday. He departed the company depot in Co. Galway each morning, driving to a warehouse in Belfast to collect the goods and returned to the depot each evening. He had no specific start time but was due in the Belfast warehouse each day in or around 3.30pm and would return to the depot at approximately 9.00pm. He did not commence work any earlier than 10.30am and this pattern of

work continued until 7 December 2009.

On 7 December 2009 the claimant failed to report for work. (RG) gave evidence that he telephoned the claimant at 12pm and the claimant informed him that he was sick and unable to report for work. As a result of this the goods in Belfast were not collected on time and the customer in Belfast was unhappy. The customer then requested that the goods be collected earlier each day. The claimant was given a formal written warning and instructed that he should report for work at 8am in the future. However the claimant never reported for work at 8am as instructed. On both 4 January 2010 and 6 January 2010 he was late for work and was issued with a final written warning. On 14 January 2010 he was again advised that his start time was 8am as “this was vital in order to give the service level our customers expect”. On the following day, 15 January 2010 the claimant was again late for work. He was suspended with pay and invited to attend a formal disciplinary meeting on 19 January 2010. He was not told in writing of his suspension nor the terms and duration of his suspension.

The claimant attended the meeting accompanied by his trade union representative. The Tribunal heard evidence that the claimant’s representative pleaded for the respondent to retain the claimant in employment at the meeting. At the conclusion of the meeting the claimant was told that the company would be in touch. On the following Thursday, 21 January 2010 at approximately 6.20pm (RG) sent a text message to the claimant enquiring if he was available to do a run on 22 January 2010. The claimant replied that he was unable to do this run as he had to bring a van to Naas on that day. The respondent then, by way of letter dated 22 January 2010 informed the claimant that his employment was terminated. He was afforded the opportunity to appeal this decision but did not appeal the decision.

Claimant’s Case

The claimant gave evidence that he worked as a truck driver for the respondent company. His working week was from Monday to Thursday and his daily hours were from 10.30am to 9pm. In or around September 2008, subsequent to the purchase by the respondent of company (R), he was asked to sign a contract of employment. As this contract was not reflective of his terms and conditions of employment, he refused to sign it. He was not provided with any procedures in relation to disciplinary matters. He continued to carry out his duties starting work daily at 10.30am, driving to Belfast and returning to depot in or around 9pm. On 7 December 2009 he was sick and unable to report for work. This was an unusual occurrence, and he had only been absent from work on sick leave for two days in the previous year. He received a warning for his absence on 7 December 2009 and was told by (RG) that he should start work at 8am as the customer in Belfast wanted the goods collected earlier. He informed (RG) that there was no point in him starting work at 8am and arriving in Belfast earlier each day as the goods were not available for collection earlier than 2.30pm each day. This did not make any sense to him and he did not agree to the change in his working hours. He continued to leave for Belfast daily at 10.30am and continued to do so into January 2010. He gave evidence that he enjoyed a good relationship with the Belfast customer who had no problems with his work.

He subsequently received further warnings in January 2010 and was suspended from work with pay on 15 January 2010. He was asked to attend for a disciplinary meeting on 19 January 2010. He accepted that his job was in jeopardy at this stage and was accompanied by his trade union representative at the meeting. He gave evidence that words were exchanged at the meeting, his union representative asked that he would be kept in employment and he was told at the conclusion of the meeting that the company would be in touch with him. On 21 January 2010 at

6.20pm (RG) contacted him asking him if he could do a run on the following day, Friday 22 January 2010. He had never worked on Fridays previously and had made arrangements with a friend to deliver a van to Naas on that day. He could not undo this arrangement and informed (RG) of that position. His employment was then terminated by way of letter dated 22 January 2010. He was given the opportunity to appeal the decision but did not do so as he believed nobody in the company could hear the appeal.

Since his dismissal he has sought alternative employment in the haulage business. He secured occasional work in June 2010 and subsequently secured full time employment in January 2011. Documentary evidence of the claimant's loss of earnings was provided to the Tribunal.

Determination

There had clearly been tensions in the employment relationship and there is no question but that the respondent was entitled to institute disciplinary proceedings against the claimant arising from the failure to notify the respondent of his absence from work on 7 December 2009 and the subsequent requirement for the claimant to collect the goods from Belfast earlier than had previously been the case. However in the letter of dismissal dated 22 January 2010 RG included the line that the claimant's inability to drive for the respondent that day was "your blatant refusal to attend for work on Friday has left me with no alternative". In circumstances where the claimant had never previously worked for the respondent on a Friday and had been suspended for the previous week the Tribunal find it unfair of RG to take into account the availability for or willingness to work on 22 January 2010 in coming to the decision to dismiss the claimant. Accordingly, the Tribunal finds that the dismissal was unfair. In assessing the loss the Tribunal has been mindful that not only did the claimant contribute to the situation but the contract with the client in Belfast has since been lost to the respondent. In the circumstances the Tribunal measures the loss under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00.

The Tribunal further awards €1,210-00, being two weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

No evidence having been adduced in this regard the claim under the Organisation of Working Time Act, 1997 must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)