

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE – *claimant*

CASE NOS.
UD894/2011
MN1033/2011
WT375/2011

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, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr J. Reid
Mr P. Trehy

heard this claim at Dublin on 1st October 2012

Representation:

Claimant: Mr Stephen O'Sullivan BL instructed by Shane Carty of Kent Carty Solicitors, 47/48 Parnell Square, Dublin 1

Respondent: Mr Frank Scott Lennon, HR for SMES, 30 The Palms, Clonskeagh, Dublin 14

The determination of the Tribunal was as follows:-

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the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and under the Organisation of Working Time Act, 1997 were withdrawn.

As the fact of dismissal was in dispute the claimant gave evidence first.

Claimant's Case

The claimant gave evidence. He worked as a driver for the respondent. His job was to collect and deliver machinery and containers. He often had to use a crane. He would be contacted by base the night before or in the morning. First thing in the morning he collected the truck. He worked Monday to Friday usually but flexibility was never a problem for him. The claimant would work on Saturday or at night if required.

He had been given a contract of employment but did not receive a staff handbook. Before January 2011 there had not been a problem with his employment.

The 28th January 2011 was a usual day. The claimant delivered a container to Ballymun. Then he did a couple of small jobs. Then he went to an industrial estate where warehouses were being renovated. A week or so before his brother had moved containers into a warehouse to be used as offices. When the roof was removed from the warehouse there was dust everywhere and the contractor wanted the containers moved out again.

On site, the claimant saw workers on cherry pickers taking down the roof. The roof was made from asbestos. The claimant was wearing protective trousers and boots but he had no mask. The claimant was reluctant to work near asbestos. A tele-porter was blowing up dust. The claimant thought that it was not a safe place to work.

The claimant phoned the despatch manager and told him about the asbestos. The despatch manager phoned the Health & Safety officer on site and then told the claimant that the site was ok. The despatch manager told the claimant to do what he could.

As the despatch manager would not listen to his concerns, the claimant pulled off site and phoned the managing director. She had previously told him not to take risks and that safety was important. The claimant explained his difficulty to the managing director and in reply she asked if he could not just do the job. Then the conversation continued until the managing director told him to park up the truck and go home. She would phone him on Monday. The claimant understood from her that he would not be paid for Monday.

The claimant felt that the managing director did not listen to him. As he would be passing close to the office on his way to the depot to park up the truck, he decided to try a face to face meeting with the managing director. The claimant went into the managing director's office and explained about the asbestos. All of a sudden she got annoyed. She said that she had it up to there trying to keep the business going. Her finger was unacceptably close to his face. He was told to leave the keys of the truck and go. A colleague gave him a lift back to the depot. Later he phoned the managing director to sort the matter out. He understood that she had had a bad day.

The managing director did not phone him until Tuesday. She said that it was not working out and gave him a week's notice. The claimant then phoned citizens' advice and their solicitor phoned the managing director. Later the managing director phoned the claimant and asked him to attend a meeting in her office. The claimant's recollection was that the meeting was held on 1st February 2011.

The claimant did not receive written notice of the meeting. He was not given the opportunity to bring a representative with him. He was not given notice of the purpose of the meeting. The managing director handed him a document that was several pages long. She told him that it was a new contract of employment and his last warning. If anything else happened he would be gone. The claimant asked to take the document away to take advice but she pulled the document back and told him that she was letting him go. The claimant was surprised because he had expected the meeting to sort things out.

The claimant made some phone calls seeking alternative work and did work an occasional week. He had a part-time job at the date of the hearing. He had no evidence of job

applications.

Respondent's Case

The managing director gave evidence. A safety issue arose for the claimant. The despatch manager contacted the client and was informed that there was no asbestos on site. The material was in fact cement fibre sheets. However if the claimant said a site was unsafe to work on, it is a given that he would not. When the despatch manager was being shouted at over the phone by the claimant, she told the despatch manager to tell the claimant to park up the truck and then the despatch manager was to hang up. There was no other work available that day.

The claimant then phoned her. He was fixated on the following Monday but she was trying to get through Friday. She too hung up on the claimant.

The claimant barged into her office and was shouting at her. She asked him to sit down so that they could sort it. There was no other work that day. The claimant's voice rose higher and so she had to raise her voice to be heard. The despatch manager and another driver heard the noise and came into her office to make sure she was ok. She asked the claimant to leave. He went to get some things from the truck. The managing director felt unwell and was shaking. The claimant returned but she told him she was sick of his voice and asked him to leave.

It was Tuesday before she phoned the claimant. She gave some thought to the matter. The claimant was a good worker but now and again he had a tantrum. Business was low. She decided to call it a day and told the claimant this.

The next day the solicitor from citizens' advice phoned her. He wanted to get the claimant back into his job. The managing director then sought advice herself. She asked him to attend a meeting with her. She had decided to give him a written warning. She handed the document to him and offered to read it to him. He read a reference to his bullying behaviour and said that he would not sign something that said he was a bully. She told him he needed to sign but he was adamant he would not sign.

The managing director did not allow the claimant to take a copy of the warning away with him. She felt that he had already made up his mind not to sign it. She accepted that she did not have an investigative meeting with the claimant before deciding that his behaviour amounted to gross misconduct. She did not give him written notice of the meeting.

The transport assistant gave evidence. She was in the transport office when the claimant came into the managing director's office. The claimant was shouting and the managing director was trying to calm him. One of the other drivers heard the shouting from downstairs and went into the office with the despatch manager.

Determination

The Tribunal carefully considered all of the evidence adduced. It is satisfied that a dispute arose between the parties which resulted in an immediate deterioration in their working relationship, which in turn led to the dismissal of the claimant.

The Tribunal has carefully examined and considered the procedures adopted by the respondent in dismissing the claimant. A proper procedural process involves (a) the carrying out of an investigation and (b) if appropriate following this a disciplinary hearing.

A proper investigation includes: 1) the claimant being informed of it, 2) being informed of what is being investigated, 3) being given the opportunity to engage in and respond to such investigative process. It is found and determined that no proper investigation was conducted by the respondent. Additionally it is also found and determined that no disciplinary hearing was conducted by the respondent prior to her dismissal of the claimant. The Tribunal is therefore satisfied that the procedures engaged in by the respondent were flawed and that the dismissal of the claimant was invalid and thus unfair. Since the dismissal was unfair any subsequent attempts by the respondent to either suspend him or to re-instate him are also invalid. The Tribunal therefore finds and determines that the claimant was unfairly dismissed.

The Tribunal finally considered whether the claimant contributed to his dismissal. It is satisfied a) that the behaviour of the claimant at the outset of the dispute was unnecessarily confrontational and aggressive and directly resulted in the respondent giving consideration to the claimant's continued employment, and b) that the claimant did not engage in a reasonable or sustained effort to obtain alternative employment and thus to mitigate his loss. The Tribunal therefore finds and determines that the claimant significantly contributed to his dismissal. The Tribunal awards the claimant the sum of €12,500.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)