

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE *-Claimant*

CASE NO.
UD2145/2010
MN2103/2010

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: Mr R. Maguire B.L.

Members: Mr J. Browne
 Mr J. Jordan

heard this claim at Wexford on 7th June 2012

Representation:

Claimant: MM Halley & Son, Solicitors, "Presentation House",
 Slievekeale Road, Waterford

Respondent: Ms. Gráinne Fahy B.L. instructed by Doyles, Solicitors, Westgate, Wexford

The determination of the Tribunal was as follows:

Dismissal as a fact was in dispute between the parties.

The claimant was employed as a lorry driver with the respondent company from the 1st October 2001 until his employment ended in April 2010. A director of the company gave evidence that until the claimant underwent an operation in 2009, he was a very good employee and they enjoyed a good working relationship. The claimant was absent for a number of months following the operation. On the claimant's return to work it became apparent to the director that the claimant had become more forgetful. However, the director did not feel that it was his place to raise this issue with the claimant but he did pass comment to the claimant about it on occasion. A number of examples of the claimant's memory loss were outlined to the Tribunal.

During cross-examination a number of these instances were put to the claimant but he refuted that he had suffered memory loss during his employment. It was the claimant's case that such issues arose following a serious accident in May 2011, one year after his dismissal.

The claimant had contemporaneous notes. It was the claimant's case that he was dismissed following an incident that occurred on the 19th April 2010. On that date he was driving a lorry drawing sand. Another lorry approached from the opposite direction. The claimant's lorry tilted and slipped off the margin and became stuck in the trench at the side of the road. The claimant thought this may have happened due to chippings that were on the road surface at the time. During cross-examination the claimant refuted that the front of the lorry was submerged however he accepted that the two front wheels of the lorry were in the ditch.

It was the claimant's position that the lorry did not suffer any damage. The claimant telephoned the director of the company and informed him of the incident. The director reacted badly on the telephone when he heard of the incident and he was very angry when he arrived at the scene. It was the claimant's evidence that the director told him that he did not want to see him. The claimant was left on the road by the director, without transport, some three miles from the respondent's premises.

It was the director's position that when he arrived at the scene he observed that the lorry was so far into the ditch that half the load of sand had fallen from the lorry. A heated discussion ensued between the director and the claimant. The claimant told the director that he had met another lorry on the road and his truck had caught the margin. The director acknowledged that this could happen on back roads but in this case the claimant had a clear view 200 metres ahead.

The director recalled telling the claimant to "get out of my sight" or some combination of words to that effect. It was not the first time that the director would have used this turn of phrase. He said it regularly and he would not have expected the claimant to have considered himself dismissed.

On the 20th April 2010 the claimant attended for work. The director asked the claimant was he looking for something as the claimant was walking around the yard. The claimant then departed the yard and there was no further contact between the parties. It was the director's evidence that he thought the claimant would return to his employment. The director stated that it was not in his nature to dismiss employees (even if there are performance issues) and the claimant was employed long enough to be aware of this fact. The claimant gave evidence pertaining to loss including that he is in receipt of disability allowance following a serious accident in May 2011.

During cross-examination the director confirmed that while he wondered where the claimant was after the 20th April 2010 he did not contact the claimant. There was damage to the lorry including damage to a panel on the side of the lorry, cab shocks, side steps and the top chassis was broken although the claimant may not have been able to observe this damage as the lorry was in the ditch. It cost the respondent company almost €10,000 to rectify the situation. A number of employees and non-employees were required as well as the hiring of a JCB to dig out the sand. It took approximately six people two days to remove the lorry, dig out the sand, transport it and clean up the area.

Determination:

The Tribunal is satisfied in all the circumstances that both parties failed to properly clarify the situation. However, the employer in such circumstances has a greater onus on it than the employee to make sure that there is no misunderstanding between the parties: the employer is generally more experienced, and has a number of employment relationships, and will be in a more powerful position by virtue of the fact that it pays the wages of the employee. Therefore, the breakdown of the employment relationship in these circumstances can properly be described as an unfair dismissal.

The Tribunal is however satisfied that the claimant contributed in a minimal way to his own dismissal – though the primary responsibility lay with the employer, the employee could have made contact with his employer and clarified the position.

The Tribunal finds that the appropriate sum to be awarded to the employee in all the circumstances is €10,000 compensation under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal also finds that the claimant is entitled to minimum notice in the sum of €1,060, as the claimant was working every second week at the time of the dismissal.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)