

## EMPLOYMENT APPEALS TRIBUNAL

### CLAIM OF:

EMPLOYEE - claimant

### CASE NO.

UD2029/10  
MN1969/10  
WT899/10

### Against

EMPLOYER - respondent

### under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Coughlan

Members: Mr P. Pierce  
Mr C. Ryan

heard this claim at Naas on 25th April 2012 and 8<sup>th</sup> November 2012

### Representation:

Claimant Mr. Gavan Mackay, Spelman Callaghan, Solicitors, Corner House, Main Street, Clondalkin, Dublin 22

Respondent: Mr. Jim Kelly BL, instructed by Sheila McConnell & Co, Solicitors, 10 Meadowcourt, Kilcullen, Co Kildare

The determination of the Tribunal was as follows:-

### Respondent's Case:

The respondent is engaged in business site development. During the claimant's tenure it had 180 employees. Since November last it has 20 employees. One of the owners is JM. His brother SM is co-owner. SM employed the claimant.

SM was made aware that the claimant had stolen fencing posts from AD and sold them on to G. SM carried out an enquiry. The claimant agreed to pay back the amount at a weekly deduction of €50.00 from his weekly salary. The total amount deducted was €400.00. The claimant received a verbal warning.

On 31<sup>st</sup> March 2009 the claimant was stopped by Customs and Excise while driving a van which contained marked diesel. The claimant admitted he put the marked diesel in the vehicle. He contended that the vehicle was owned by his employer. The claimant had purchased the

vehicle in N. Ireland. The vehicle was transferred into the name of the company solely to facilitate its insurance on the company's fleet policy. The respondent also paid the tax on the vehicle. The VRT on the vehicle was paid by the claimant.

An allegation was made that the claimant had taken marked diesel from the company's property. This occurred in or around April 2010. The Gardai were alerted but the claimant was not apprehended at the scene. An investigation was subsequently carried out by the respondent.

On Monday 8 July 2010 JM spoke to the claimant for about fifteen minutes about the incident. The claimant did not deny or admit stealing the diesel but he said he would have to speak to his wife and to his solicitor and that he would settle the matter for €40,000.00. JM then told the claimant that he would have to dismiss him for gross misconduct.

The claimant had been given several verbal warnings during his tenure. The claimant was afforded an opportunity to appeal his dismissal.

The Tribunal heard evidence from JF, an employee of the respondent company. On 6<sup>th</sup> July 2010 JF saw the claimant removing diesel from the tank of a dumper truck, belonging to the respondent company, with a hose and putting it into a drum. He told the Tribunal that employees would often take diesel from one machine to another. JF remembered seeing the diesel being taken but could not confirm to the Tribunal if he reported the incident to the respondent at the time.

During cross examination JF confirmed that when he saw the claimant access the tank of diesel he did not think that it was out of the ordinary.

The Tribunal heard evidence from DL, an employee with the respondent company. He explained that he was not familiar with the claimant nor did he take diesel from a dump truck and put it into a drum. He also denied seeing the claimant put 2 drums into his vehicle.

DL remembered being asked about this incident in the office of the respondent on the morning of 15<sup>th</sup> July 2010. He was also given a written statement to sign. However, he told the Tribunal that he did not know what he was signing as he was given the English statement before he was provided with the Romanian version. He denied taking diesel, unlawfully or otherwise, regardless of what was contained in his signed statement.

DL explained that he saw the claimant with drums but did not know where he was taking them. He denied any involvement in taking the diesel or splitting it with his colleague.

During cross examination DL confirmed that he saw the claimant with the drums and the claimant said they were for work. DL did not have the statement read to him prior to signing it. He could not recall when the claimant was dismissed for the respondent company. DL confirmed to the Tribunal that he was also dismissed by the respondent but was given his job back one week later when he agreed to sign the statement.

### **Claimant's Case**

The claimant worked for the respondent company for a period of 7 years. His duties included groundwork, floors, cement, operating and driving machinery.

The claimant confirmed that the respondent accused him of stealing on 3 occasions during his 7

years of employment. On the first occasion the claimant was accused of stealing a number of fencing posts. The claimant did not agree that he took the posts. The respondent deducted the cost of the posts from the claimant's wages at a rate of €100 per week. The claimant never agreed to this deduction. The claimant did not receive any disciplinary action from the respondent in respect of this incident, nor was he approached by the Guards for information in respect of the stolen fence posts.

On the second occasion the claimant was stopped by Customs and Excise in 2009 while driving a van which contained marked diesel. The claimant told the Tribunal that he drove to the respondent's yard that morning and SM fuelled the van from the diesel tank. The diesel tanks in the respondent's yard are kept locked. A fine was imposed by Customs and Excise. SM contacted Customs and Excise and informed them that the claimant was the owner of the van. The claimant then received a fine in respect of the offence and got called to court with SM. The company did not carry out an investigation in respect of this incident.

The third occasion involved an incident which took place on 8<sup>th</sup> July 2010. The claimant was approached by JM who told him that he had been watching him for a couple of weeks because he had been told by people that the claimant was stealing from the company. He asked the claimant where the van was. The claimant explained that his brother had borrowed it. The claimant was questioned by Gardaí and asked if he robbed any diesel. He replied that he had not. The following day, when the claimant drove onto the building site, the guards followed him. They checked his van, chassis number, and filters. They then informed JM that there was no proof the claimant stole anything.

JM instructed the claimant to go to the front gate and keep a record of all vehicles coming on to site. Approximately three hours later JM approached the claimant and offered him €20,000.00 to settle any outstanding issues. The claimant told him that he would accept €40,000.00. JM refused and told the claimant he was fired and sent him home.

The claimant told the Tribunal that JM was trying to get rid of him as an employee because he instructed a solicitor to act on his behalf in respect of personal injuries he sustained on site while working for the respondent company. The claimant had also submitted two claims to the Rights Commissioner Service. As a result of this the respondent's attitude and behaviour changed towards the claimant.

The claimant did not receive any correspondence outlining the reason for his dismissal. He was not informed of a right to appeal his dismissal. He was never provided with a contract of employment or a copy of the company's disciplinary procedure.

The claimant gave evidence of loss which was queried during cross examination.

During cross examination the claimant confirmed that he received a verbal warning in respect of the alleged stealing of the fence posts. He maintained that he did not steal the posts but JM insisted that he pay for them.

The claimant insisted that he did not own the van in which he was stopped by custom and excise. He asked SM to buy the van for him as a company van. He could not explain to the Tribunal why his name was listed as the new keeper of the van on the revenue documents dated 6<sup>th</sup> July 2007.

The claimant confirmed that when SM unlocked the diesel tank in the respondent company's yard he got the hose and filled the van with diesel himself but did not know that it was marked diesel he used. The claimant denied receiving any verbal warnings from JM or SM in respect of the incident involving the marked diesel. The only warning he received was in respect of the fencing posts.

**Determination**

Having considered all of the evidence adduced in the above case the Tribunal finds that the dismissal of the claimant was procedurally unfair and awards the claimant €1,500.00 compensation under the Unfair Dismissals Acts, 1977 to 2007.

The claimant did not receive his statutory minimum notice entitlement. Accordingly, the Tribunal awards the claimant the €3,344.00, four weeks pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

There was no evidence adduced in respect of the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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