

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**  
EMPLOYEE

*- claimant*

**CASE NO.**  
RP645/2011  
UD465/2011  
MN506/2011

against  
EMPLOYER  
under

*- respondent*

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr F. Moloney  
Mr T. Brady

heard this claim at Drogheda on 24th October 2012  
and 26th February 2013

**Representation:**

Claimant(s) :

Respondent(s) :

The determination of the Tribunal was as follows:-

**Background:**

Dismissal is in dispute in the case.

The claimant was employed as a lorry driver with his first employer (JH) from the 8<sup>th</sup> April 1992 until the 30<sup>th</sup> September 2005. At this stage JH set up a partnership with EW. Although no formal Transfer of Undertaking took place at this stage the claimant worked for the partnership until the 29<sup>th</sup> August 2010. The respondent (EW) then took over the business as a sole trader and

the claimant remained working for him. The claimant did not receive any notification of the transfer of undertakings. Neither was he given a contract of employment nor was he informed of any grievance procedure but he was informed the respondent was taking over the business straight away.

There had been a discussion regarding the claimant being paid a redundancy payment but the respondent said that he would only pay 50% for the period that he was the employer in the partnership business of JH and EW (the respondent on the date of termination). Nothing further came of the discussions regarding redundancy. A rate of pay was discussed between the claimant and the respondent (EW) and it was agreed the claimant would be paid € 450.00 net per week. The claimant contends the respondent agreed to pay him a bonus of € 1,000.00 per year. The respondent contends the bonus would only be paid at Christmas the profits were up.

He commenced employment with the respondent on the 29<sup>th</sup> August 2010. The respondent was abroad the previous week and JH changed the list of clients to deliver to. This changed the way the afternoon deliveries were listed. On Sunday 29<sup>th</sup> August 2010 he completed his run and the same on Monday. He was then off until Thursday the 2<sup>nd</sup> September 2010.

On the 2<sup>nd</sup> September 2010 the respondent contacted the claimant asking why he was not in Dundalk as he had received a telephone of complaint. The claimant returned to the Dundalk depot and met the respondent. The conversation became very heated. The claimant left the premises.

### **Claimant's Case:**

The claimant stated that on the day in question, the 2<sup>nd</sup> September 2010, he had received a call from the respondent who became very irate and abusive and told him to return to the Dundalk depot. The claimant tried to explain that JH had changed the run the previous week. He hung upon the respondent and returned to finish his run and then returned to the Dundalk depot. He spoke to the respondent who told him to "give him a shout tomorrow and I'll pay you for the 2 f\*\*\*\*\*g days". The claimant believed he had been dismissed and left the premises.

He tried to contact the respondent the following day and on a number of occasions but only got to speak to him 10 days later. The respondent told the claimant that it was he who had walked away from his job and then hung up the phone. He never contacted the claimant again. Some weeks later JH delivered a cheque for the 2 days payable to the claimant to the claimant's Mother's home. The cheque bounced. Some weeks later a bank draft for the amount payable was sent to the claimant's solicitor.

The claimant gave evidence of loss.

On cross-examination he said that although the respondent had taken over the business on the 29<sup>th</sup> August 2010 he said he was still answerable to JH until the respondent returned from abroad.

JH had given him the new list of the deliveries. He refuted the respondent had given him the new list of deliveries.

He denied that he told the respondent to “f\*\*k off and to stick his job up his a\*\*” or that he had thrown the keys of the truck at the respondent. He had not asked for his job back when speaking to the respondent on the phone 10 days after the day in question. The claimant stated he had not left his employment, he had been dismissed.

### **Respondent’s Case:**

The respondent stated that the milk company, he was contracted to, compiled the list of deliveries. He originally had a partnership business with JH and they employed the claimant. JH and himself decided to end the partnership and the respondent bought a truck and two trailers from JH to take over the contract. He then traded as a sole trader. There were 2 runs; the respondent did the night shift and the claimant did the day shift.

He said that he met the claimant on the 28<sup>th</sup> August 2010, agreed a net weekly wage of € 450.00 and handed the claimant the 5-page list of deliveries to be carried out. At first the claimant carried out the deliveries as listed.

On the 2<sup>nd</sup> September 2010 he received a call from a client in Dundalk who complained he had not received his delivery of milk and his customers were waiting. He contacted the claimant around 11.30am and asked where he was. The respondent told the claimant “for f\*\*\*s sake you should be in Dundalk”. The claimant and the respondent arrived in the Dundalk depot. The claimant reversed the trailer and got out of the cab. The respondent told him he should have done the run a certain way. The claimant replied “I’ll do it the way I f\*\*\*\*\*g want, you can shove your job up you’re a\*\*.” He then threw the keys at the respondent and left.

He did not speak to the claimant until 10 days later. It was the first contact he had with the claimant since the incident in the Dundalk depot. The claimant asked for his job back, the respondent replied that he thought the claimant had left and he had replaced him (the claimant).

On cross-examination the respondent stated that he had not dismissed the claimant but that the claimant had left. He explained that the reason JH had delivered the outstanding cheque to the claimant’s Mother’s home was because he was not aware where the claimant lived. The reason the cheque had bounced was because he had changed bank accounts. He agreed he had been angry with the claimant but had listened to what he had to say. He said he had not tried to contact the claimant after he had left. He agreed the claimant had no contract of employment and that there was no grievance procedure in place.

### **Determination:**

The Tribunal have carefully considered the sworn evidence and submission given by both parties in this case. The Tribunal was extremely dissatisfied with the conflicting evidence given by both

parties. On the balance of probabilities the Tribunal finds the claimant was unfairly dismissed but that, by his behaviour, he had contributed significantly to his dismissal.

Accordingly the Tribunal awards the sum of € 1,750.00 under the Unfair Dismissals Acts, 1977 to 2007.

Loss having been established the Tribunal awards the sum of € 3,600.00, this being eight weeks wages, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Redundancy Payments Acts, 1967 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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