

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE,

CASE NO.
UD1343/2011
RP352/2013

– *claimant*

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Ms. M. Sweeney
Mr. J. Flavin

heard this case in Cork on 23 January 2013 and 19 April 2013

Representation:

Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

The respondent, a sole trader, gave evidence of taking over the running of the business in June 2009. The business operates as a refuse collection service. The witness believes the claimant commenced employment in March 2009 driving a refuse collection truck. He was the only employee for a period and was a good worker. In 2010 and 2011 the business was not doing well with many customers not paying for the refuse service being provided. As the business struggled the witness was putting his own money into it to keep it going. In early 2011 he spoke to the claimant about a reduction in pay but the claimant refused to accept a pay cut. As he could no longer afford to pay the claimant he wrote to him on the 15 March 2011 informing him his employment was ending. After the 29 March 2011 the witness began to do the work himself. After a period of five weeks he realised he wasn't up to the job and contacted the claimant asking him to return to employment but the claimant refused. He then employed his nephew paying him less than what the claimant was paid. The witness accepted that the claimant worked seven days per week. He also stated that if the claimant had accepted the pay cut he would still be in employment. He referred to the loss of two large customers as the reason for the business doing poorly. The witness denied sending his nephew out in the truck with the claimant during the period leading up to the dismissal and

also denied dismissing the claimant one day short of the claimant having two years service.

A second witness who was financial adviser for the respondent at the time of the dismissal outlined the serious financial difficulties of the business. In November or December 2010 he informed the respondent of the financial situation. Between September 2009 and November 2010 the respondent put three cash injections into the business. He advised the respondent on the cuts required and was involved in the decision to dismiss the claimant. The witness no longer works for the respondent.

Giving sworn testimony at a resumed hearing, TM (the respondent's nephew) was asked if the claimant had accompanied him on the respondent's truck but TM denied this saying that the claimant had not trained him in. TM explained that the respondent had been working himself but had injured his shoulder and that TM had been without work. The respondent called to TM's mother's home and offered work. TM was given keys and a list of shops. He knew Cork City. He taught himself to do the work. The claimant did not accompany him or show him the route.

Under cross-examination TM was told that the claimant would give the Tribunal a different version of events. TM did accept that he had met the claimant "loads of times in the yard" but said that he had never worked for the respondent previously. However, he knew the respondent well and had been unemployed for two years. He maintained that he had received no training and, when it was put to him that his employment appeared haphazard, he simply replied that the respondent had been injured and that DNL (then aged fifteen or sixteen) had "chipped in".

TM said that he had kept working for the respondent and that TOS had also worked for the respondent. After TM was asked how long TOS had been there the Tribunal was told by the respondent's side that TOS had been there for about three months.

TM stated that he had done the job alone for about twelve months after which the respondent had got a second truck. TM worked seven days per week for twelve months and had then gone to six days. It was put to TM that CLD (another worker) had been dismissed. TM did not deny this but said that there was a reason for that and that JL had taken over from CLD and had been there a few months.

In clarification for the Tribunal TM said that he had started at the beginning of May 2011 and that he had initially taken home five hundred euro but that he would call to customers to try to get in money and that he might get a hundred euro if he did that for a week. He stayed at five hundred euro when he went from seven to six days. He got into the routine.

When it was put to TM that his work was task-and-finish he replied that he just did the run and put in the time it took him to do the work.

Giving sworn testimony without the aid of an interpreter despite his non-Irish origin, the claimant said that his employment had started in March 2009 two weeks earlier than the respondent had said. He had initially gone with two others (MRS and ART). There was work seven days per week. He told the respondent that he could work on his own. He was getting eight hundred euro for seven days (although he had got just under six hundred euro when CLD was there). He started early each day and finished at lunchtime. He was trying not to disappoint the respondent.

The Tribunal was now referred to a letter of 15 March 2011 from the respondent to the claimant giving him two weeks' notice that he was being let go on the grounds that the business had been "suffering financially for the last number of months" and that the respondent had "decided to go back and do the work myself with my son".

The claimant stated that the respondent had asked him to train TM for about a week and that TM had accompanied him in the mornings. When it was put to the claimant that the letter had referred to the respondent and his son the claimant said that the respondent's son had been too young for driving and that he (the claimant) had had the son with him for a few months around Xmas 2010.

The claimant said that, when he got notice, he was asked to train TM (the respondent's abovementioned nephew) for two weeks and that he had to give TM keys and show him places.

In clarification the claimant said that the keys were for shops that the claimant needed to open and that customers had provided the keys.

When it was put to the claimant that TM had denied being trained by the claimant the claimant replied: "Maybe he forgot." The claimant added that TM had done other jobs for the respondent and that TM had been on the route a few days before the claimant trained him in.

The claimant said that it was not true that, as TM said, TM was given a list of shops and told to do the work. The claimant added that he himself had got confused between keys when he had started. He denied that the respondent had offered to take him back after letting him go notwithstanding that he had made a call about redundancy. He was told that he needed two years' service.

Under cross-examination the claimant was referred to the 15 March 2011 letter from the respondent and reminded that it stated that the respondent would do his job. The claimant replied that perhaps the respondent wanted him down to seven hundred euro but that the respondent was old and could not do the job on his own. It was TM (the respondent's nephew) who took over.

It was put to the claimant that TM had denied having been trained by the claimant. The claimant replied that he had taken TM with him for about a week.

The claimant said that he had not previously heard of the respondent having financial problems but that he had known there were financial difficulties unconnected with him. However, he had told the respondent to give him another driver and to leave him on six hundred euro for six days per week. When asked how would that help the respondent he did not address the question but told the Tribunal that he had told TM that he wanted to be a bus driver.

In a closing submission for the respondent, it was simply contended that the claimant had been re-offered his job shortly after the end of March 2011 and before TM had started. On behalf of the claimant it was stated that there was a flat denial of any phonecall offering the claimant his job back and the Tribunal was asked to note that no time had been given for it. It was argued that it had been a knee-jerk reaction to let the claimant go for financial reasons in that the respondent had had time to make another plan rather than ride rough-shod over the claimant's rights. The business had continued and, twelve months later, a second truck was bought and another man was employed. The claimant had been willing to accept less money to work less days. However, TM had been lined up before the claimant left.

Determination:

Having carefully considered the evidence adduced, the Tribunal found that the claimant's work had gone to being done by the respondent's family after the respondent had financial difficulties. The respondent could not afford the claimant. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

However, in finding that the claimant was fairly dismissed by reason of redundancy, the Tribunal finds that the respondent was on notice that there was a belief that the claimant had the required two years' service for redundancy. The fact that the claimant's representative prosecuted an unfair dismissal claim and that the Tribunal found that the claimant had been fairly dismissed by reason of redundancy does not disentitle the Tribunal from finding, from the wording of the claim form and from all the documentation and evidence presented to it, that there is a valid redundancy appeal and that the appellant employee had the required two years' service.

Under the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that the appellant is entitled to a redundancy lump sum based on the following details:

Date of birth:	05 June 1975
Date of commencement:	16 March 2009
Date of termination:	29 March 2011
Gross weekly pay:	€1112.52

It should be noted that payments from the Social Insurance Fund are limited to a maximum of €600.00 per week.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)