

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYE E-appellant

CASE NO.
MN1538/2009

against
EMPLOYER-respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Letterkenny on 19th February 2010

Representation:

Appellants: Ms. Aine Murray, Patrick J Sweeney, Solicitors, Canada House, Meenmore, Dungloe, Co Donegal

Respondent: Mr. Frank Dorrian, P. A. Dorrian & Co., Solicitors, Main Street, Buncrana, Co. Donegal

The decision of the Tribunal was as follows: -

Appellant's Case

The appellant was employed as a Lorry Driver on the 10th of July 2006. The appellant was paid in cash from the commencement of his employment. The appellant did not have any difficulties with the respondent until his dismissal on the 23rd of March 2007.

The respondent put a note in the appellant's wage packet requesting his bank details so he could be paid by electronic transfer. On the day of dismissal the respondent approached the appellant and she again requested his bank details. The appellant refused, as he preferred to be paid in cash, in response the respondent said, "*right finish up so.*" The appellant understood this to mean he was dismissed so left the site and parked his lorry in the respondent premises.

Cross Examination

The appellant received his instructions for his duties for the day that morning in the yard. The respondent had attempted to contact the appellant that morning but his phone was broken which required him to replace it the next day. The day following his dismissal the appellant returned to the

respondent offices to pick up his wages and get forms from Social Welfare stamped. The appellant had never received any disciplinary warnings prior to his dismissal and was shocked at his dismissal. The appellant did not question the respondent's actions he decided to leave the premises immediately as he had been asked to do. The appellant did not go to the respondent's house that evening.

Respondent's Case

The respondent had made the decision to stop paying their staff with cash and switch to electronic transfer; this was in the process of being implemented.

The appellant drove a lorry for the respondent. As a means of getting instruction from the respondent the appellant was required to answer his phone. The respondent attempted to phone the appellant 6 or 7 times on the morning of the 23rd March 2007. The appellant did not answer his phone so the respondent went to the site to speak to him. The respondent asked him why he didn't answer his phone to which he replied, "*Because I don't have to*", the respondent informed him that he was no good to her if he wouldn't answer his phone to which the appellant replied "*I may as well go home so*" the respondent replied by saying, you might as well. It was never the respondent's intention to dismiss the appellant; she was making the point to the appellant that he should answer his phone. The respondent presumed that the appellant had 'gone off in a huff,' and would return as normal for work on Monday morning.

The respondent received a text from the appellant later that evening requesting his P45 and he later appeared in a car outside their house behaving in an antisocial manner.

Cross Examination

The respondent confirmed that she said to the appellant "*If you wont answer the phone you are no good to me. You may as well go home.*" The appellant replied by saying "*alright I will go home.*" The respondent did not attempt to withdraw her instructions or engage with the appellant regarding his future with the respondent.

Determination

The Tribunal find by majority decision with Ms Kerrigan dissenting that the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 fails.

Ms Kerrigan finds in her dissenting opinion that as the respondent received a text from the appellant that evening requesting his wages and P45, but decided not to attempt to retract her instructions to the appellant regarding his dismissal. I feel that the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 succeeds.

Determination

The onus is upon the appellant to prove that it was reasonable for him to believe that he was dismissed. While the Tribunal does not dispute the evidence of the appellant that he believed he was dismissed, the Tribunal is of the view that this belief was not a reasonably held belief.

It is common case that there was some form of dispute between the parties at the time of the conversation between them on the site. The appellant accepts that he was not contactable on his mobile telephone that morning and he accepted under cross examination that the Respondent

witness complained to him about that when she approached him on site. Other than this, there is a conflict between the parties. The appellant says that the dispute arose because he would not provide bank details to the respondent.

However it is immaterial what the dispute concerned. A dispute arose and that is significant. There is a conflict on evidence as to what was said next. The respondent witness states that “there is little point in you being here if you are not contactable”, he then said “maybe I should go home” and then she said “go home then.” The appellant states that when asked for his bank details and he refused that he was told to “finish up so.”

Taking the appellants evidence at its height, the fact that he was told to “finish up” is ambiguous as to whether that meant for that day, until he got his phone fixed or that his position was being terminated if it was said in the context of an argument. As the parties were in the middle of a disagreement, what ever that disagreement concerned, it was premature to believe that “finish up” in the context of an argument, meant that he was being dismissed. Once told this the appellant should have sought clarity as to what decision was being taken by his employer. Or at least after matters had cooled, he should have contacted the respondent to clarify whether or not he was being dismissed.

Having considered all the evidence in this case the Tribunal finds by majority, with Ms. Kerrigan dissenting, that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)