

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD737/2009

WT319/2009

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr. L. Tobin
Mr A. Butler

heard this claim at Wicklow on 12th April and 13th April 2010

Representation:

Claimant : Ms Audrey Coen B L instructed by
John O'Leary & Company, Solicitors, Millennium House Main Street, Tallaght,
Dublin 24

Respondent : Ms. Christine Carroll, Solicitor, 8b Ashford House Business Centre, Ashford,
Co. Wicklow

The determination of the Tribunal was as follows:

The claimant in this case was prosecuting a constructive dismissal case. The respondent maintained that the applicant resigned from its employment. Prior to the hearing the appeal under the Organisation of Working Time Act, 1997 was withdrawn.

Claimant's Case

The claimant commenced employment with this modest sized trucking and delivery enterprise in the summer of 2004. Ninety-five percent of his sixty to seventy hours working week was spent driving a company owned arctic truck in the mid eastern region of the country. Occasionally he undertook longer journeys on behalf of the respondent to the west and southwest. The claimant told the Tribunal that responsibility for the upkeep of that truck rested with the company. His main point of contact for work related activities was with the owner of this company. Both men

communicated with each other up to six times a day. While he never received payslips, a contract of employment or terms and conditions of employment the claimant never aired any complaints about his treatment until the issue of overtime payments were raised in the autumn of 2008.

The witness who was never given a grievance policy also indicated that an “open door” policy to working issues was not available. He worked long and hard for the respondent and had never been at the receiving end of reprimands or warning from the company. He expected to get paid for hours worked in excess of a normal working week. The contents of a letter dated 23 October 2008 from a haulier relating to him and his reported comments was never shown to him prior to this hearing. Upon reading it the witness said that no such conversion took place and that he never voiced those allegations about the respondent and its owner to that haulier.

According to the claimant an agreement was reached following discussions with the owner on overtime payments. However, that encounter with this director caused a breakdown in communications between them as the working relationship between them “was never right” after their verbal exchange. The witness said that trust in his employer was now gone. From November 2008 up to January 2009 when he resigned the claimant received his work instructions from the office manager. They were in regular and daily contact with each other. However, on occasions he was left sitting around the company yard in his truck for up to three hours waiting for those instructions. He indicated that such treatment was a contributory factor in his decision to resign.

The witness was not made aware that there was a change in the functions of the owner and office manager around October/November 2008. He understood that the owner remained his contact person but since a silence had developed between them he felt at the time that the office manager was acting in lieu of the owner. Prior to this non-communication and post the silence period the claimant had told the respondent that his truck needed attention to bring it up to road worthy standard. In his view the employer did not act on these complaints. On one occasion when he commented about an instructed delivery the office manager told him he knew what to do if he did not like that particular instruction. By January 2009 the witness described the situation with the respondent as a nightmare. By that stage he was considering his position and on 26 January he wrote the following letter to the owner.

This is a formal letter of resignation. It is no longer viable for me to continue working under the following conditions.

- 1. No verbal communication with yourself for 7-8 weeks with efforts made on my part.*
- 2. 90% of communication has occurred through text for 7-8 weeks, which has caused miscommunication.*
- 3. Work place conditions not adhering to health and safety standards:*
 - a) No airbag in the truck for the past 6 months*
 - b) The horn in the truck is not working*
 - c) Wheel arches are broken*
 - d) Lights in the truck do not work*

- e) *No lights working in the fork truck for offloading in the evening*
- f) *I have been working with the company for 4 years and my licence is obviously very important to me and you have placed me in an awkward position insisting I drive a Monty Reid fork truck with no licence. Which could have caused me to lose my licence in case of an accident.*
- g) *The roof of the trailer is in an unfit condition with large holes in the top of it.*
- h) *I have not received a payslip in four years which was requested on an ongoing basis*

Therefore with regret I resign with immediate effect.

Respondent's Case

Prior to moving their delivery and distribution yard to his own domestic premises a director of this company told the Tribunal that the former yard was located in south Dublin. Apart from housing the yard on his property the director together with a partner and office manager also conducted their administrative functions from an office attached to their private residence there. Most of their customers were in the equine and poultry business and there was a seasonal aspect to their operations in that wintertime was a noticeably busier time than summer. The witness said that the only overtime to staff was to work until lunchtime on Saturdays on exchange for a full day's pay. Ninety-five percent of the respondent's interaction with staff was conducted orally. This director never had any problems with the claimant up to late 2008 as he gave him "a free rein" as flexible arrangements existed between these two men.

Among those arrangements was the explicit understanding that should the truck used by the claimant need repair and maintenance then the claimant had the authority to get that done.

Up to three mechanics were available to repair that truck and the claimant was aware of that. Besides, the witness never told the claimant that deliveries got preference over the state of the truck. In acknowledging he had at least two discussions with the claimant in late 2008 over the issue of overtime the director stated that no agreement had been reached between them on that issue. Around the same time the witness changed his role within the company as he was now "out on the road" undertaking a selling role. His partner was fully attending to administrative matters in the role of office manager. She informed the claimant of that change and thereafter Communication between the director and claimant greatly reduced from up to eight conversions a day to almost no communication.

The witness was "horrified and sick" at the contents of a letter dated 23 October from the owner of a licensed haulage firm. That owner who was an agent for the respondent reported that the claimant had made serious allegations against the respondent. Since he was not dealing with claimant at that time the witness did not approach him about those allegations. The director added that he did not know what how to handle those contents but said that his partner issued a verbal warning to the claimant related to those allegations.

References were made to letters between the parties. It emerged that the witness did not write a letter dated 10 December 2008 in his name to the claimant nor did he reply to a letter received by

him from the claimant dated 17 December. He did not know who wrote a letter to the claimant dated 24 January 2009 bearing his signature.

A general haulage owner who worked closely with the respondent was surprised to hear the claimant tell him about certain aspects of the respondent's business and of the director's personal affairs. This witness then dictated a letter to his son and the witness then signed and dated it 23 October 2008 and forwarded it to the director.

The next witness became the full time office manager in November 2008 and was familiar with the claimant's case. She said the claimant was told of that change as the owner was going out "doing the marketing and trying to get new business." One of her functions in that role was the

management of delivery sheets. However, despite numerous requests to the claimant to submit his tacographs he always failed to do so. She added this was not a big issue at the time as she believed men in general did not like paperwork.

This witness who described the claimant as a good employee said he worked up to fifty hours over a five day week. He called into the respondent's premises once a week. The claimant operated out of a separate location during the week but usually called on a Saturday to the respondent's premises to collect his travel and subsistence payments. He was paid a fixed net rate each week and she trusted him to get on with his work.

There was never a problem with the claimant up to October 2008. She was upset and "like a lunatic" upon reading of the contents of a letter sent by a haulier to the owner. When she put those contents to the claimant he replied stating he did not know what she was talking about. They continued to verbally communicate with each other at least once a day over work issues. The witness recalled an exchange on the premises on 23 December 2008 when the claimant refused to carry out a run for the next day citing defects in the truck. She told him to go and get it repaired and he never complied with that request. The office manager denied she told him that if he did not like his work he knew what to do.

In addressing the letter of resignation the witness said item number 1 was untrue and that item number 2 was incorrect. As regards the truck she had pleaded with the claimant on a number of occasions to get it fixed. The letter of resignation surprised her at the time but she told the Tribunal that she now believed the claimant had been planning that move for some time in order to embark on another enterprise.

Determination

Having carefully considered the evidence the Tribunal is satisfied that the claimant has not discharged the burden of proof required under the relevant legislation. The Tribunal does not accept the claimant's evidence concerning communication or lack thereof between the respondent and himself. The claimant had a responsibility to ensure the truck was roadworthy and was reminded of that obligation several times.

In any event the claimant failed to provide loss of earnings. The claim under the Unfair Dismissals Acts, 1977 to 2001 falls.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

Sealed with the Seal of the
Employment Appeals Tribunal

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(Sgd.) _____
(CHAIRMAN)

