

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE -*Appellant*

UD793/2009

MN816/2009

against

EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Lucey

Members: Mr. J. Hennessy
Ms. H. Kelleher

heard this claim at Cork on 14th April 2010

Representation:

Claimant: Mr. Donncha Kiely B.L. instructed by Ms. Mary Neville,
Martin A Harvey & Co, Solicitors, Parliament House,
9/10 Georges Quay, Cork

Respondent: Mr. Michael Joyce, Joyce & Co., Solicitors,
9 Washington Street West, Cork

The determination of the Tribunal was as follows:

Dismissal as a fact and the dates of various events were in dispute between the parties.

Claimant's Case:

The claimant commenced employment as a truck driver with the respondent in November 2004. His role entailed delivering pallets, mainly to city centre locations.

It was the claimant's case that he was injured at work on Thursday, 5th February 2009. The claimant finished his work that day but the following day his movement was restricted and he did not attend work. The claimant was absent for a period of eight days. He submitted a medical certificate to his employer.

Prior to his return to work, the claimant telephoned the Managing Director (hereinafter MD). It was agreed between them that the claimant would be given lighter duties but when the claimant returned to work he was not provided with lighter duties and subsequently he sustained a second injury. He informed his employer that he would be unable to work due to the injury.

On Sunday, 1st March 2009 he telephoned MD and informed him that he could be absent for a period of six or twelve months due to the injury. MD asked the claimant if he should take it that he was submitting his notice. The claimant simply replied that he was unable to carry out the work. The claimant subsequently received his P45 by post.

The claimant gave evidence pertaining to loss.

During cross-examination the claimant confirmed that he worked for a period of time after he had sustained the first injury. He accepted that the injury might have occurred in late January 2009. The claimant stated that on doctor's advice he currently cannot perform heavy lifting tasks.

Respondent's Case:

The Managing Director gave evidence that the claimant made up to twenty deliveries in the city centre in the mornings and made collections in the afternoon. He received a telephone call from the claimant in early February 2009; who informed MD that he had sustained an injury on the 28th January 2009. A copy of the accident report form was submitted to the Tribunal. This was the only accident reported by the claimant to the respondent.

The claimant had worked Thursday, 29th January and Friday, 30th January 2009. The following Monday, 1st February 2009 the claimant contacted the respondent and stated he would not be attending at work. A medical certificate was received from the claimant some time after this and was dated the 5th February 2009. The claimant was paid for the period he was absent.

The claimant returned to work on the 18th February 2009. Prior to this date MD had spoken with the claimant. When possible he would have liked to place the claimant on lighter duties. He asked the claimant if he was in a position to carry out his usual role and the claimant confirmed that he was but would continue to receive physiotherapy. The claimant was given his normal duties when he returned to work.

He worked the 18th, 19th, 22nd, 24th and 25th February 2009 and during this time no further accident was reported nor was a complaint received from the claimant.

On the 26th February 2009 the Warehouse Manager received a telephone call from the claimant who informed the manager that he would not be attending for work that day or the following day.

On Sunday, 1st March 2009, MD received a telephone call from the claimant. MD's note of the telephone call was opened to the Tribunal. The claimant informed MD that he would not be back to work at all. The physiotherapist had informed the claimant that he could be out for a period of six months. MD asked the claimant if he was submitting his notice and the claimant confirmed he was. MD stated that he did not dismiss the claimant. He stated that if he had in some way misinterpreted what the claimant said during the telephone call, the claimant would have contacted him. The claimant's P45 issued to him on the 3rd March 2009.

During cross-examination MD stated that he had told the claimant that when he returned to work on the 18th February 2009 he would endeavour to provide him with lighter duties but the lighter duties

did not transpire.

Determination:

The Tribunal carefully considered the evidence of both parties. There was a conflict of evidence between the parties as to whether a dismissal occurred. The Tribunal finds on the balance of probability that the claimant was not dismissed from his employment with the respondent. The claims under the Unfair Dismissals Acts, 1977 to 2007, and the Minimum Notice and Terms of Employment Acts, 1973 to 2005, are dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)