

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:** **CASE NO.**

EMPLOYEE MN805/10  
WT357/10  
- claimant UD845/10

**against**

EMPLOYER - respondent

**under**

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr J. Goulding  
Mr. N. Dowling

heard this claim at Dublin on 22nd August 2011.

### **Representation:**

Claimant: Mr. Conor Bowman BL instructed by Mr. Jeremiah McCarthy, Carney McCarthy & Co., Solicitors, 1 Clonskeagh Square, Dublin 14

Respondent: Ms Audrey Coen BL, instructed by Ms Aisling Costello, Patrick O'Toole, Solicitors, 5 Church Street, Wicklow Town, Co. Wicklow

The determination of the Tribunal was as follows:-

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

The claimant commenced employment on 13<sup>th</sup> October 2003 as a driver and was based in Co. Wicklow. He received weekly subsistence to cover his travel. In January 2004 he was offered work in a new location in Fonthill. He accepted this offer. His contract was from 7 am to 3 pm and had less travel time to work. Sometimes he worked till 5 pm. Most of his work was concentrated in the Dublin area. JD was his employer.

In early 2010 a third party asked him to go to JD's premises. He was worried. He met JD and asked him if he was being sacked. JD responded no but that he was testing the waters and selling

on the truck that the claimant drove. JD gave him the option of walking away, purchasing the truck for €40,000, or that there was possibly a job for him in JD's premises in Wicklow. JD would let go another employee in the Wicklow location. The job in Wicklow entailed him commencing work at 6.30 am and working every second Saturday. Under no circumstances was redundancy available to the claimant. He asked for his terms and conditions of employment. JD told him to f... off and that his terms and conditions were de facto. JD asked him to work the next two days. The truck was to be washed in advance of being taken to an auctioneers. When the meeting concluded the claimant was asked to think about the options.

The claimant had concerns and took legal advice. He met JD again and asked for his redundancy entitlement. JD said there was no redundancy and he was aggressive. JD was unwilling to engage with him.

On Friday, 19<sup>th</sup> February 2010 the claimant spoke to the employees who worked in Fonthill and relayed to them how his job operated. His understanding was that one employee was taking over his job. The following week he reported for work at the premises in Fonthill. He contacted JD every day and by the end of the week he received a torrent of abuse from him.

The new job in Wicklow entailed an earlier start for him and a 5.30 finish. He had a young family at that time and those hours did not suit him. He felt he deserved to be treated fairer. He hand delivered a letter written on his behalf by his solicitors to the respondent on 1<sup>st</sup> March 2010. He felt his job was gone when he was paid his holiday entitlements. He gave JD an opportunity to respond to his letter and as he had no response he deemed his employment to have ended on 2<sup>nd</sup> March 2010. He regarded JD as a friend and they were similar in character. He had no problems with him as a boss. He never furnished a letter of resignation and never requested his P45.

Since his employment ended he did some voluntary work in a local school and was in receipt of social welfare payments until March 2011. Since then he is ineligible for any payments as his wife works.

### **Respondent's Case:**

The respondent (JD) is a sole trader engaged in the transport business. The claimant was a driver and drove a van for the company. Each driver is permitted to take vans home every evening. The respondent had twenty-two employees and fourteen vehicles. Business went well in the first few years. He had an open door policy in place. Should any staff member have a grievance they could discuss it with him in the office or otherwise discuss their grievance over the telephone.

In April 2009 his operation began making losses and rather than close down the business and put everyone on the dole, he sought an alternative line of business. He analysed the truck which the claimant drove. He was only averaging €375.00 profit on the truck each month. He thought the truck was worth about €40,000. He realised he would have to sell the truck. He was approved and became the new owner of a DPD franchise and borrowed €300,000 to finance this purchase.

He was working sixteen to seventeen hour days. He asked the claimant to bring the truck to his premises. The truck required repair work of €5,000.00.

In February/March 2010 he spoke to the claimant and suggested three options to him, to go and look for another job, for the claimant to purchase the truck from him and JD would put a good word in for him or for the claimant to return working for him in Wicklow. He told the claimant he would

give him the handiest run. JD said there might be Saturday work. His accountant told him he could no longer pay any subsistence. The accountant's advice was that he should never have paid the claimant subsistence. The claimant asked for his redundancy entitlement.

JD had made two employees redundant, one in Cork and one Donegal and redundancy payments were paid to each employee. He encountered delay in receiving his rebate.

The claimant's last day at work was 18<sup>th</sup> February 2010 and JD asked the claimant to bring the truck to the auctioneers on 19<sup>th</sup> February 2010. The claimant returned the company phone to him. JD expected the claimant to report for work at the Wicklow location the following Monday.

JD was working extremely hard and taking care of the administration work at home. He was not in receipt of a salary since April 2009. He worked 80 hours per week.

In the week commencing 22 February 2010 the claimant constantly rang him at 7 o'clock each morning. He reported to Fonthill each day. JD was not too happy. He told the claimant to cop on to himself and that there was a job for him in Wicklow. JD wanted the claimant to work in Wicklow.

JD never dismissed the claimant and never received a letter of resignation.

He received a letter dated 1<sup>st</sup> March 2010 from the claimant's solicitors on 2<sup>nd</sup> March 2010. He had so much on his plate he did not respond to that letter. He handed it over to his solicitors. He thought his solicitor would revert to him.

The claimant was still on his books. JD honestly hoped and believed the claimant would cop on to himself and report for work in Wicklow. He corresponded with the claimant in the following months.

### **Determination:**

The Tribunal carefully considered the evidence adduced at the hearing.

The claimant was offered alternative employment that was similar to his old work but there were fundamental differences which were far reaching for the claimant. It would appear from the evidence that redundancy was not offered to the claimant because the respondent had not the required funds. Another reason for not offering redundancy was that the respondent suffered a delay, in another case, in recouping his rebate from the Department.

The Tribunal finds that the claimant was unfairly dismissed and awards him €38,500 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal also awards the claimant €2,414.20 being the equivalent of four weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

As no evidence was adduced in relation to the claim under the Organisation of Working Time Act, 1997, the claim is therefore dismissed.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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