

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD252/2006, MN141/2006
WT79/2006

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney

Members: Mr G. Phelan
Dr. A. Clune

heard this claim at Ennis on 16th April 2007

Representation:

Claimant : Mr Lorcan Connolly B L instructed by
McMahon, O'Brien, Downes, Solicitors, Mount Kenneth House, Henry Street, Limerick

Respondent : Ms Leonie McCauley B L instructed by
Cashin & Associates, Solicitors, 3 Francis Street, Ennis, Co. Clare

The determination of the Tribunal was as follows:

Claimant's Case

The claimant commenced employment with the respondent in August 1995. The respondent is a modest sized company engaged in the manufacture of bulbs for the film and other industries. The claimant had a specialised role within that company and described himself as a maintenance supervisor in the plant. Due to the non-issue of a contract of employment to the claimant he did not have an official title or a list of duties to perform at the work place. A husband and wife team were the directors of this company. The claimant and the male director were acquainted with each other prior to the establishment of this business. The claimant had some input into the establishment of this enterprise.

In September 2004 the claimant sustained injuries to his left shoulder and back due to an accident at work. Those injuries required medical attention and treatment and forced the witness to be absent

from work due to ill health. The witness arranged for medical certificates to be furnished to his employer stating he was unfit for work. Six weeks following that accident the claimant solely relied on social welfare payments as his income as the respondent ceased payments to him. The witness referred to letters he received from the company dated 10th and 14th February 2005. Those letters asked the claimant to present himself for a medical examination with the respondent's doctor. The witness confirmed that he attended all medical appointments and followed all procedures advised by his medical examiners. As a result of those visits and procedures the witness had made such a recovery that he could return to work in August 2005.

The claimant's doctor declared him fit to return to work from 22nd August 2005. The company doctor was aware of all developments relating to this case. When the claimant phoned the male director on 19th August to inform him of his imminent return that director told him that he wanted a certificate stating he could perform his normal duties. The director repeated that condition in a letter of the same date. The respondent did not allow the claimant to recommence work on 22 August 2005 and the director added that the claimant had to produce a final medical certificate from his doctor stating he was fully fit to resume full normal duties at the respondent. The claimant was now out of work due to the unwillingness of the employer to take him back and his social welfare payments had stopped on the expectation he was recommencing employment.

The claimant revisited his doctor in late August 2005 and again received a certificate stating he was fit to return to work. He again submitted that certificate to that director and sought a return to work date from him. In reply that director wrote that he regarded the claimant's medical certificate as very vague and again asked for a certificate stating that he was fit to resume all duties. In addition the director's letter further sought a certificate from the claimant's orthopaedic or rheumatologist consultant that he was fully recovered from his injuries and was now fit to resume all duties. The claimant made arrangements to meet with his rheumatologist and his doctor in accordance with the employer's conditions. The claimant also asked the director to supply him with a list of duties "in order to avoid any confusion and to avoid further delay with my return to work". The witness wanted to present such a list to both doctors.

The director forwarded a general statement of the claimant's duties and responsibilities to him on 20th September 2005. On 28 September the claimant forwarded a final certificate from his doctor repeating he was fit to return to work. That certificate also confirmed that the claimant's rheumatologist had also declared him fit for work on 16th September 2005. The claimant's doctor also acknowledged his fitness to return was in reference to a list of duties as outlined in the director's letter of 20th September. In his correspondence to the director on 28th September 2005 the claimant took issue with aspects of his list of duties and indicated he would discuss those with him when he returned to work. The director replied on 3 October giving the claimant one week's notice of his return to work.

When the witness attempted to return to his job on 10th October 2005 the director approached him saying there were issues that needed to be addressed. Those issues concerned the claimant's list of duties. The director presented the witness with a list based on his letter of 20th September. The director had no comment to make on the issues raised by the claimant. The claimant indicated that he had no control over stock levels and was not aware of the company's health and safety policy. The director insisted that the claimant had to sign his agreement to perform those duties before he could re-commence work. The claimant was also told to either sign his acceptance of that list or else leave. The witness described this exchange as heated. He did not sign his acceptance because the director refused to discuss his concerns. The director told him to discontinue taking notes on their conversation. The witness left the premises and contacted a firm of solicitors in relation to his

situation with the company. The claimant also sought assistance from a trade union official. That official proceeded to contact the director and was met with resistance and hostility.

The claimant made references to the non-payment of an expected bonus. He also maintained there were no procedures for the granting of annual leave and said he was due nineteen days outstanding leave based on his entitlements for the previous year he worked and up to his date of termination. The company's leave year commenced on 1st July.

The trade union official involved confirmed he phoned the relevant director with the aim of resolving matters between the claimant and the company. The witness commented that the list of duties as presented to the claimant looked like a change in the claimant's terms and conditions of employment. The official felt this was an industrial relations matter and thought it unreasonable for the employer not to discuss these changes. It was clear to the witness that the director understood and knew that the claimant was a union member.

Respondent's Case

The director directly dealing with the claimant outlined the respondent's case. The witness described the claimant as his most experienced and skilled employee especially at the time the business was established. He added that without the claimant he could not have run the business. The claimant was heavily involved in its operations and the director considered him skilled and expert in his work. By February 2005 there was still no news of a definite date when the claimant would return to work following his absence through injury at work the previous September. The witness was becoming increasingly concerned at the lack of a definite return to work date. The company was considering recruiting temporary replacement staff and was missing the claimant's input into its operations. The claimant was the most important technical person with the respondent and took charge of operations during the director's absence. In the pursuit of a definite return date for the claimant the director contacted him in February 2005 requesting that he attend a doctor nominated by the company.

When the director was notified that the claimant was fit to return to work on 22nd August 2005 he then sought a final certificate saying that the claimant was fit to resume full normal duties. The witness supplied that list in the latter half of September 2005 and was annoyed when the claimant questioned the details of some of his duties. The witness said that the first time he heard of the claimant's union membership was when a trade union official phoned him to discuss the claimant's situation.

In cross-examination the witness accepted that he did not issue the claimant with terms and conditions of employment. His response was "hands up" when it was put to him that the claimant never received a contract of employment. The witness told the Tribunal that historically the claimant had those roles as listed in his letter of 20th September 2005. He accepted that some of the listed duties and responsibilities of the claimant were a bit vague. The director also confirmed that the claimant did not receive a bonus payment in 2003, as the company's financial affairs did not allow for that payment. The company made a significant profit in 2005. In acknowledging that annual leave was not paid to the claimant the director justified that he was not entitled to it, as he was absent through illness and drawing social welfare payments.

The director described the certificates declaring the claimant fit to resume work as not good enough. Those certificates were not specific enough for the respondent who wanted to know whether the claimant had limitations in regards to his work when he returned. Since the claimant

was the respondent's most important employee the director also wanted to know the date on which the claimant could resume work. That explained why he contacted the claimant at his residence and arranged for him to see a doctor connected with the company. He asked for a certificate from a rheumatologist through concern that the claimant's shoulder injury would affect his ability at work. That concern stemmed from a comment made by the claimant's doctor on a medical certificate dated 30th August 2005. The witness felt he acted reasonably in dealing with the claimant and was willing to allow him recommence his work with the respondent once he signed up to the list of his duties and responsibilities.

Determination

The Tribunal are satisfied that the employer's conduct in relation to the claimant's return to work was completely unreasonable taking all the circumstances into account. The employer was, in the opinion of the Tribunal not entitled to seek to require the claimant to sign a list of duties that were neither discussed nor agreed between them. To say that the signing of this list was a condition precedent to the return to work of the claimant was wholly unreasonable bearing in mind the evidence tendered in relation to the certified fitness to return to work of the claimant. Further the Tribunal find that the employer was unreasonable in failing to discuss and come to some arrangement in relation to the issue with either the claimant or his trade union representative, who was acting as an intermediary to try and assist the claimant to get back to work.

In the premise, the Tribunal find that a dismissal occurred. The tribunal find that the dismissal was unfair under the Unfair Dismissals Acts, 1977 to 2001.

By majority the Tribunal award the sum of €35,000.00 to the claimant by way of compensation under those Acts, and award €4816.92 as compensation for six weeks notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The appeal under the Organisation of Working Time Act, 1997 also succeeds and the appellant is awarded €3050.72 for outstanding leave entitlements.

Mr Phelan dissents as to quantum only.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

