

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD1253/2005

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O' Mahony B.L.

Members: Mr. P. O' Leary
Mr. T. Kennelly

heard this claim at Limerick on 29th November 2006

Representation:

Claimant : David J. O'Meara & Sons, Solicitors, Bank Place, Mallow, Co. Cork

Respondent : Eugene Carey & Co., Solicitors, Courthouse Chambers, Mallow, Co. Cork

The determination of the Tribunal was as follows:

Dismissal was in dispute in this case.

Claimant's Case

The claimant was one of two welders employed by the respondent who owns a steel fabrication business. The other welder employed by the respondent was a brother of the claimant. Up to September 2005 the claimant and his employer enjoyed a good working relationship. Later that month on 27 September 2005, at around 4.50pm, the claimant sustained a back injury at work. The following day he attended a bonesetter, who reset two slipped discs for him and advised him not to attend work for a while because of a risk of recurrence. That evening he went to his doctor because of the pain and was prescribed painkillers. He informed the managing director of these developments and indicated he could not report for work for the next few days. His doctor had given him a letter. When he telephoned the managing director about medical certificates he told him to bring them when he would be coming in. On Wednesday, 5 October he went to meet the managing director but he was not there and the managing director's wife signed the social welfare form for him. His doctor gave him a letter for social welfare purposes.

On rare occasions the claimant made gates in his spare time. The respondent was aware of this enterprise and it had never been a source of conflict, as it did not interfere with the claimant's work

with the respondent. The gates were made in his cousin's workshop. A third party called to the claimant's home, the week following his accident, to enquire about having a gate made. They visited the workshop to look at the manuals there. The following Friday the third party asked to have the design changed and told him it would be evening before he could do that as the workshop would be closed during the day. On 7 October 2005, at around 05.00pm, the claimant drove to the workshop, which is about ten minutes away. His cousin, who had his child with him, was in there getting timber for the fire. The managing director of the respondent arrived at around 5.15 pm and asked to speak to him outside. The managing director told him that he had heard that he had been working since he had left work, that he would not have him back on his premises anymore and that his P45 would be sent to him. The managing director would not tell him what evidence he had that he had been working. The claimant said that he was not working when the managing director arrived nor had he worked there since his accident on 27 September 2005. The managing director's sister-in law, who also works in the business, was with him when he came to the workshop. The witness denied that he told the managing director to "stuff" his job or asked for his P45.

His supervisor telephoned him four times, after his solicitor had written to the respondent, asking him to return to work. He declined the offer, as he was too embarrassed to return.

The claimant's cousin told the Tribunal that he was also a welder and worked elsewhere. He had a bit of equipment in his workshop and both he and the claimant made gates in it. The claimant hadn't tools and he uses the witness's. They made only around ten gates or less in a year. When the witness returned home from work shortly after 5.00pm on 7 October 2005 his wife informed him that a man had called earlier looking for the claimant, that she had told him if he (the claimant) was there he would be in the workshop and that the caller then tried the workshop door. The witness then went to the garage for timber and within minutes the claimant arrived. Within another few minutes the managing director of the respondent appeared and asked to speak to the claimant outside. While he saw them talk outside the garage the witness did not hear the contents of their conversation. When the claimant came back into the workshop he was in a state and told the witness that he had just been dismissed. No work was being done in the workshop on the evening of 7 October 2005, nor had any work been done there during the previous weeks. The claimant had called earlier in the week for a book. The witness said that the claimant does not have a key to the workshop.

Respondent's Case

The claimant's supervisor, who is the managing director's sister-in law, was present in the respondent's workshop on the afternoon of 27 September 2005. Also present were the claimant and another employee. They were in a jovial mood and the other employee commented to her that if the claimant wouldn't be in the next day he would be at the ploughing championships. The claimant was indeed absent that day and thereafter. He telephoned to say he was sick and would be back in a couple of days. The claimant's brother was also a welder with the respondent but he was on holidays at the time.

Together with the managing director the witness visited the claimant's cousin's home on 7 October 2005. They had called there earlier around 04.50pm. When they approached the workshop the second time at around 05.10pm. They heard clanging and when they entered the workshop they saw the claimant, dressed in his working clothes (steel-cap boots and jeans) and bent over with a long steel iron bar in his hand. His cousin was standing by the wall with a child in his arms. They moved out into the yard. The claimant denied any wrongdoing. Their conversation became heated and the claimant told the managing director to "stick his job ----" and to give him his p45. She understood

his comments to mean he was resigning from the respondent.

The witness felt certain that the claimant would calm down after a couple of days and she then telephoned him a number of times asking him back to work; the respondent was in dire straits at the time and the claimant was a good welder. When those efforts failed the claimant was issued with his P45. When they left the workshop on 7 October 2005 they were intending to visit the claimant's home but as a result of a telephone call they went to the workshop instead.

The managing director who was responsible for employment matters told the Tribunal under the company's sick leave policy an employee has to submit a medical certificate when absent from work in excess of two days. The respondent finally received such a document on 18 October 2005 declaring the claimant unfit for work for a specified earlier period. The witness acknowledged he received phone messages from the claimant shortly after his injury at work. That accident occurred on a Tuesday. When the claimant remained out of work for a number of days the witness's suspicions grew and on the following Monday, 3 October 2005, he hired a private detective to investigate the claimant's absence. He got a report from the private He received a report from that detective two days later. He wanted the claimant back. His absence, at a time when the other welder was on holidays and the respondent had a major contract, was having a detrimental effect on the business and he wanted to find out the position once and for all.

Along with the claimant's supervisor the witness called to the home of the claimant's cousin in the late afternoon of 7 October 2005. He went there because of information he had received from the private detective. When he entered the workshop he saw the claimant, dressed in his working clothes on his haunches examining a pipe. The witness expressed his disappointment to the claimant on his behaviour and when the claimant told him he had been in bed up to the previous day the witness told him he did not believe him. When he told the claimant that he knew that he was working and could prove it the claimant's attitude changed and he told him to "stuff his f---- job" at which point the respondent got into his car and drove off. It was the witness's belief that the claimant had been working while absent from the respondent. The managing director did not have a problem with the claimant's work or timekeeping and had found him to be a very nice fellow and a top class worker. He had no problem with the claimant making gates after work.

In cross-examination the witness accepted he was very annoyed to learn that the claimant was working while absent from work. He based his judgement on what he saw and on the report of the private detective. However, he was still keen to retain him in employment and to seek his return to the company. He knew that his sister-in-law was trying to get the claimant back.

Determination

When the managing director found the claimant in the workshop on 7 October 2005 he formed the opinion that he was working. The Tribunal finds on the balance of probability that in the heated discussion that ensued between them the respondent did tell the claimant that he did not want him back. In the circumstances it was reasonable for the claimant to consider himself dismissed.

The company was aware and seemingly approved of the claimant's other employment provided that work did not clash with the respondent's business hours. The Tribunal accepts the claimant's evidence that he was calling to the workshop to look at/get a manual. It further notes the evidence that the claimant was not in the workshop, short before 5.00pm the first time the managing director called. Considering these facts the Tribunal finds on the balance of probability that the claimant was not engaged in making gates at that time. No other evidence was given to show that the

claimant was engaged in employment while absent from the respondent. The incident in the workshop on 7 October 2005 occurred outside normal working hours.

The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. Considering the period of loss and the fact that the claimant was unfit for work for some of that period the Tribunal awards the claimant €540.00 as compensation under those Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

