

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
Employee RP204/2006
UD424/2006 MN266/2006
against
Employer
under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary BL

Members: Mr. F. Cunneen
Ms. R. Bergin

heard this claim in Dublin on 19th September 2006
and 19th December 2006

Representation:

Claimant(s): No representation in attendance by or on behalf of the claimant

Respondent(s): Charles B. Kingston, Solicitor, 32 Bachelors Walk, Dublin 1

The determination of the Tribunal was as follows:-

Respondent's Case

Although the respondent's notice of appearance did not give reasons for the dismissal the following defence was furnished on the first day of hearing:

Following continued bad timekeeping and absences that had not been applied for in advance, the respondent raised this with the claimant who, rather than showing a wish to amend his behaviour, simply invited the employer to terminate his employment. Given the lack of co-operation by the employee with the employer's initial request, the employer then had no option but to grant that of the employee and the employment was terminated.

At the first Tribunal hearing a statement dated 15 May 2006 which was signed by the respondent's late managing director (hereafter referred to as Mr. O'B) was presented. The statement gave the

following explanation:

On “Wednesday the 8th of November 2005” (sic) the claimant had not been at work at 8.00 a.m. At 8.30 a.m. the claimant’s son rang Mr. O’B and Mr. O’B asked why he and his father were coming to work at 8.30 a.m. instead of 8.00 a.m. The son apologised and said that it would not happen again. Then Mr. O’B spoke to the claimant and asked why he was coming in to work at 8.30 a.m. Roaring at Mr. O’B in an aggressive manner, the claimant asked if Mr. O’B wanted him to go home. Mr. O’B told the claimant that he did not care what the claimant did. The claimant then put the phone down on him. When Mr. O’B arrived at the workshop at 10.00 a.m. the claimant had left the premises. Mr. O’B had no explanation from the claimant on the Wednesday, Thursday or Friday of that week.

When Mr. O’B arrived at the workshop on the morning of Monday 14 November 2005 the claimant was at the saw bench. Another employee (hereafter referred to as Mr. C) was present. Mr. O’B called the claimant over and told him that he could not just walk out and come back whenever he liked. The claimant said aggressively into Mr. O’B’s face: “Sack me! Sack me!” Mr. O’B said: “All right, I sack you.”

Mr. O’B’s statement went on to say that this kind of conduct had been going on for two years. Out of forty-five weeks in 2005 the claimant had worked thirty-four. Mr. O’B was seventy-one and crippled with arthritis. He depended on all his employees to be trustworthy which they were except for the claimant. Mr. O’B could not depend on him to be on time for work and he would leave early too. When Mr. O’B would go home at about 2.00 p.m. he would ring back in the afternoon and ask to speak to the claimant. The claimant would have gone home early.

The above statement having been given to the Tribunal, witnesses were called to give evidence for the respondent.

The first witness was the respondent’s general manager (hereafter referred to as Mr. G). He said that Mr. O’B had passed away on 23 August 2006 and that, after Mr. O’B’s business partner had passed away about three-and-a-half years earlier, he (Mr. G) had asked “all the lads” if they minded if he, being one of the longest serving, took over and “gave it a shot”. They said that they would not mind.

Mr. G told the Tribunal that there had been misbehaviour by the claimant on numerous occasions in the last three-and-a-half years. The claimant was coming in late and leaving early. The claimant took no heed of Mr. G and said that Mr. G would never be his boss. “The lads” kept telling Mr. G that the claimant was coming and going as he wished. Mr. G got on to Mr. O’B.

The only issue on which Mr. G “fell out” with Mr. O’B was why Mr. O’B would not reprimand the claimant. “It kept going on” until the “final Wednesday” which Mr. G thought had been 2 November 2005.

On Monday 7 November 2005 the claimant was working in the respondent’s back shed when Mr. O’B came in and asked the claimant why he was there as he had left on the previous Wednesday. The claimant said that he had been sick. Mr. O’B said that the claimant had taken all his tools. The claimant goaded Mr. O’B into sacking him. In the end, Mr. O’B said to the claimant that he was indeed dismissed. This was a continuation of bad behaviour by the claimant since Mr. O’B’s business partner had died. The claimant’s son had got a job with the respondent through the claimant and continued to work satisfactorily for the respondent without giving any problems.

Cross-examined by the claimant, Mr. G did not dispute that it could have been 8.10 a.m. that the claimant and his son had arrived on Wednesday 2 November. The claimant put it to him that he had only brought his tools home on the following Monday when he was dismissed. Mr. G replied that Mr. O'B had told him that the claimant had brought home most of his tools on Wednesday 2 November.

Questioned by the Tribunal, Mr. G said that he had said that it was not fair to "the lads" if they all came in early and the claimant came in late. Mr. G admitted that he could not tell the claimant what to do but said that he had spoken to the claimant about lates because "the lads" were saying it to him. The respondent employed eight of them and a secretary. The claimant was the only person with whom Mr. G had had a problem about being his boss.

Giving evidence, the respondent's accountant (hereafter referred to as Mr. A) said that €723.36 was the claimant's weekly pay. Referring to the claimant's written claim to the Tribunal (which gave a minimum of €834.65 as the claimant's weekly pay and indicated that substantial overtime was being worked), Mr. A said that the claim form included some holiday pay. Mr. A indicated that the claimant had worked between thirty-two and thirty-five weeks in 2005.

Continuing his evidence, Mr. A said that he had been a friend of Mr. O'B who had been a very honourable person and that he (Mr. A) had been aware of various complaints about the claimant's timekeeping and attitude.

Mr. A told the Tribunal that the respondent had made a loss in the year to September 2005, that 2006 would be the same and that the respondent only had the money to pay salaries for two weeks. Mr. A's advice was that there would have to be redundancies. The respondent had no money but hoped that the situation could be "turned around" although business was now very competitive.

The third witness on behalf of the respondent Mr. J.C told the Tribunal that the respondent company had employed him over a period of time. There was a difference of opinion in the company regarding the rules in relation to timekeeping. The claimant would come and go. There was no complaints regarding the claimant's work apart from his time keeping. On the 9 November he did not hear a conversation that took place between the claimant and Mr. O B. The claimant walked out and collected his toolbox. The claimant told Mr. J.C that he was sacked.

In cross-examination Mr. J.C stated that the claimant was a good worker. There was never any altercation between Mr. O'B and the claimant prior to this.

The fourth witness on behalf of the respondent Mr. P.O'B told the Tribunal that he worked in his father's company for the last three years during his summer holidays. Mr. P. O'B reported for work on time and stayed until the time of departure. He could not say if the claimant recorded the times that he reported late for work. He recalled that the claimant came into the back shed and asked his son whom the respondent also employed if he was finished work. The claimant's son told his father that he would be finished in fifteen minutes. Mr. O'B's father used to tell the claimant to report for work on time and he continued to come in to work late. The company was closely knit and as long as the work was completed Mr. P, O'B's father was happy with that. Mr. PO'B's father was gutted when the claimant left the company and he was tired of the claimant's behaviour.

Mr. PO'B was not sure if staff were docked if they were late. There were no procedures in the company and when his Dad passed away the family wanted to keep the business. The financial

situation of the respondent has deteriorated since the death of Mr. O'B.

Claimant's Case

The claimant told the Tribunal that he worked for the respondent company for thirty-five years on and off and he had a very good working relationship with the owner. He was employed for twelve years prior to 2006 and worked continuously for the past twelve years. He had a break for two to three years and he was then re-employed and undertook work on bars and machinery... During the time that Mr. T O'B the owner of the respondent was ill and the claimant took over and was responsible for the work. The claimant stated that he was responsible for the running of the jobs. He priced work and this he did for the last ten years. During this time the claimant's wife became ill and the owner instructed the claimant to look after his family. The claimant relayed an incident, which occurred when he reported for work at 8.10a.m. He was due to report for work at 8a.m. It was not unusual for him to work late and he also worked as a driver for the respondent's family. He became annoyed and lateness was not an issue that was discussed. He did not receive any complaints about his tardiness. At one time the claimant and his son undertook work on the owner's house.

The claimant stated that he was working with Mr. PC when Mr. P O'B came in and called the claimant a liar. The claimant was dismissed and he felt that the fault lay on both sides. The claimant was employed as a cabinetmaker and his son was employed as an electrician.

The claimant was out of work for twelve months and was in receipt of disability benefit. He is still attending hospital for a medical condition. He has worked occasionally for which he received €80 to €100 per day.

In cross-examination the claimant did not agree that he was late consistently and that he was late on one occasion. It was not unusual for the claimant to work a fifty-four hour week. He was the boss in the yard. He did not ask his employer to employ his son. He disagreed that he reported for work when he felt like it. He found his employer a reasonable person.

In answer to questions from the Tribunal he stated that he was paid by the hour. When asked how would his employer know what hours to pay him for he responded that the hours that he worked were documented. He reported late for work on average once a month.

Determination

Having heard all the evidence in this case the Tribunal finds that there was a considerable element of contribution by the claimant to his dismissal. The Tribunal awards the claimant compensation of €9,000 under the Unfair Dismissals Acts, 1977 to 2001. The Tribunal is satisfied that the claimant's employment ended without notice and he is therefore entitled to six weeks minimum notice in the amount of €5,007.90 (which is equivalent to €834.65 gross per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. As the Redundancy Payments Acts, 1967 to 2003 and the Unfair Dismissals Acts, 1977 to 2001 are mutually exclusive the claimant is not entitled to any award under the Redundancy Payments Acts, 1967 to 2003.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)