

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO
UD111/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes

Members: Mr J. Walsh
Ms. K. Warnock

heard this claim at Navan on 1st February 2007

Representation:

Claimant : Ms. Maureen Finlay, Advocacy Resource Officer,
Citizen Information Centre, 1 Mayoralty Street, Drogheda, Co. Louth

Respondent : Mr Anthony Moore BL instructed by
Feran & Co., Solicitors, Constitution Hill, Drogheda, Co. Louth.

The determination of the Tribunal was as follows:

Claimant's Case

The Claimant commenced employment with the Respondent in early 2004. In May of that year the Respondent changed name and by that time the Claimant was primarily employed as a fitter of fireplaces. Depending on the location the witness would fit one or two fireplaces in a working day. The working day had no set hours and once he returned to the depot in Ashbourne and subject to the work requirements there the Claimant could then finish his work. The witness described his relationship with his employer as not bad. However, he also cited some instances of friction over money, dockets and a missing drill. His relationship with his employer "soured" following the drill incident.

Prior to October 2005 the Claimant had fitted a marble fireplace in a customer's residence. Both he and the Respondent were aware that this fitted fireplace had some defects prior to it being fitted. The Claimant was not surprised that the customer complained when he noticed that the fireplace did not fit properly. When the Claimant returned to the premises in the afternoon of 4 October 2005 a situation arose in relation to NF, HF and fireplaces. The owner's son who was driving a forklift at the

time disembarked and proceeded to assault the Claimant. The witness described how he was thumped and generally manhandled by HF. At one stage both parties rolled around the ground. The witness also alleged that HF held a part of a cement block with the intention of striking him. NF intervened to calm the situation. The assault however continued and HF knocked the Claimant's mobile phone from his hand, as he was about to call the Gardaí. The witness soon fled the scene and before going home reported to the local Garda station and made a statement on that incident.

The Claimant acquired a medical certificate the next day following a visit to a doctor. He was also in telephone contact with the Respondent and informed the company on 5th October that he was not returning to work. That verbal resignation was later confirmed in writing. The Claimant stated that he could not return to the Respondent for safety and security reasons.

In cross-examination the Claimant was unable to comment on customers' complaints, as he did not recognise the names of those clients. He felt competent at his work and added that he always cleaned up after himself. The Claimant said he was not agitated in the company yard on 4 October 2005 over the sighting of a fireplace in a skip. It was also incorrect to state that he was annoyed at being asked to remain on at the Respondent's to fit a fireplace in the show room. The witness denied holding a crowbar or other tool in his hand and he did not make any attempt to strike NF. However, during his verbal exchange with NF, HF rushed forward and began hitting and thumping the Claimant. HF was a constant visitor to the premises and was frequently present there in the previous two months. The witness could not recall if he told the Respondent he would return to work on 6 October 2005. He indicated that this incident was recorded on close circuit television.

Respondent's Case

The Respondent is a modest family run enterprise with up to ten employees including NF's daughter, KF. NF was also a director in the company and he stated there were never any problems in his relationship with the Claimant. According to the witness the Claimant's work was fair enough but was sometimes shabby. He denied that there was a souring of the relationship. The Respondent had to give a big discount to a customer on a job in which the Claimant was engaged. He spoke to the Claimant about that episode and felt that the Claimant accepted the situation.

The witness was in the company yard in the afternoon of 4 October 2005 when the Claimant appeared and made enquiries about the contents of a skip. For safety reasons the equipment in the skip was not to be used again. The Claimant "lost his rag" over this issue and held an iron bar over his head and the witness thought he was about to be struck by him. HF, who was nearby, wrestled the Claimant and when the tussle ended the Claimant drove off fast from the yard.

In cross-examination the witness stated that the Claimant did not have a contract of employment but had a verbal disciplinary procedure, which was not implemented against the Claimant. NF stated that nobody, including himself, was physically struck during the incident on 4 October 2005. There was no CCTV recording of that incident.

HF stated he was neither employed by the Respondent nor was paid for any work he

did there. It was not true that he was frequently on the premises in the months prior to 2 October 2005. Up to that date there were no problems between himself and the Claimant, who he described as moody at times. The witness was on a forklift at the time the Claimant arrived in his van into the yard. He noticed the Claimant and NF were in conversation when he saw the Claimant raise a bar as if to strike NF. HF rushed over and tackled the Claimant to the ground. He did not use any part of a cement block in any encounter with the Claimant. Later he made a statement to the Gardaí about this incident. He did not make a complaint.

KF stated that a fireplace at the centre of a customer's complaint was not chipped prior to delivery. She added that the Claimant was not asked by the Respondent to pay for tools or missing money. The daughter did not witness the incident in the yard on 4 October 2005. However, she took a telephone call from the Claimant that evening. During a subsequent call the Claimant informed her he was not returning to work.

Determination

The Claimant commenced employment with the Respondent in early 2004. He was initially employed as a van driver but after a few months he was trained to fit fireplaces. The Respondent is a small, family-owned business that supplies and installs fireplaces. In May 2004 the Respondent moved to Ashbourne, Co. Meath and began to trade under a different name.

NF, the managing director, described the Claimant's work as fair enough, although he said that it could sometimes be below standard. When it was below standard he would be shown how to do it properly. This is what happened with all employees when their workmanship was insufficiently high.

There appeared to have been a good working relationship between the Claimant and the Respondent. There were some difficulties, such as the occasion when a considerable amount of money, payment for a fireplace, went missing from the Claimant's custody. The Claimant was not blamed in any way for this. On another occasion, an expensive tool belonging to the Respondent was stolen from a van outside the Claimant's house. The Claimant said that he was asked to pay for it and that his relationship with NF soured considerably after that, in that NF would not talk to him. NF denied that relations had soured. He said that he had limited opportunities for dealing with the Claimant in the course of a day. The Claimant's own evidence bears this out, in that his normal duties were to deliver and fit fireplaces in customers' houses and that the fireplaces would either be loaded early in the morning and he would then leave the Respondent's premises for the day, or else he would have taken them home in a van the previous evening and set off in the morning without having needed to visit the Respondent's premises. He also told the Tribunal that, generally, when he had fitted two fireplaces in a day that his work was done, irrespective of the hour. It seems reasonable, therefore, to say that there were limited opportunities for the Claimant and NF to have any interaction. NF also told the Tribunal that, after the drill incident, he gave the Claimant's child a christening present.

This is a claim of constructive dismissal arising out of an incident in early October 2005. It was the Claimant's evidence that he had declined to assist in the fitting of a fireplace in the showroom, because he considered his day's work to have finished.

HF jumped off his forklift and came running towards the Claimant and started to beat him. On the Claimant's account, this was done entirely without provocation. The evidence given on the Respondent's behalf paints quite a different picture. A crate containing a fireplace had been brought over to the showroom by HF on a forklift. NF asked the Claimant to help to fit it in

the showroom. This was being done because a similar fireplace had recently been fitted very poorly in a customer's house. The Claimant was angry about having to do this. He, nonetheless, started to open the crate with a crowbar. He then raised the crowbar above NF's head. HF, fearing for his father's safety, ran over and grabbed the Claimant in a bear hug and grappled with him. No blows were struck.

The Tribunal is satisfied that the area in which this incident took place was not covered by CCTV cameras, as suggested by the Claimant.

The Claimant left the premises. That evening he telephoned KF, a director of the company and a daughter of NF. He told her that he had a headache and was going to his doctor the next day and so would not be into work. He then telephoned the following evening and said that he had been advised to resign from his employment.

The Claimant made no attempts to discuss his employment or any problems with NF before resigning. NF had, in the past, shown himself to be a reasonable employer. The Claimant said that he was afraid of HF. However, HF did not work for the Respondent and was there only on an occasional basis. Further, having resigned, the Claimant did return to the Respondent's premises without firstly having ascertained whether HF would be there.

As this is a claim for constructive dismissal, the onus is on the Claimant to prove his case. The Tribunal is not satisfied that the incident that led to the Claimant's resignation happened as he described it. Indeed, the Tribunal prefers the evidence of the Respondent's witnesses. For this reason, this claim must fail.

The Tribunal notes, however, that the Claimant had no written contract of employment and that there was no formal disciplinary or grievance procedure. Such things are for the benefit of both employer and employee and the Respondent would be well advised to adopt them. Their absence in this case does not alter the Tribunal's determination.

The claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

This _____

(Sgd.) _____
(CHAIRMAN)