

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD885/2005
MN649/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 6th September 2006

Representation:

Claimant(s) : Ms. Caroline Keane, Sweeney McGann, Solicitors,
67 O'Connell Street, Limerick

Respondent(s) : Duncan Inverarity, BCM Hanby Wallace, Solicitors,
1 High Street, Dublin 8

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant told the Tribunal that he had worked for the respondent for almost four years. Some twenty years prior to this he had an accident in which the tendons of the two middle fingers of his right hand had been injured leaving the tips of his fingers sensitive. At his interview he informed the respondent that as a result of the accident he had difficulty picking up small objects and coins. The respondent was looking for someone to work in the stores at the time and he had previous experience in the stores. Had his disability been a problem he would not have commenced employment with the respondent. He started employment in September 2001 and worked in the stores for the first two years. Occasionally, he would fill in for other staff. He received training in manual handling techniques and had no problems. There were never complaints about the standard of his work.

Two years into his employment he accepted the manager's offer to work in the Frozen Food section. In this job he was stocking shelves with frozen goods. In this first three and a half years' service he had not been on any sick leave.

At the end of February 2005, the manager asked him to move section to work on the tills. The claimant explained his difficulty with handling coins but the manager would not listen to him and told him that he was “going on tills and that’s it”. The claimant had a number of meetings with the Store Manager about it but he was only being bullied and harassed into doing something he could not do. The Store Manager told him he was organising training for him. He knew he would be unable to handle the coins. He tried it for a half day and he felt a fool when the coins fell out of his hand. He felt stressed. When he could get no resolution he went to his doctor who put him on sick leave and certified him to be suffering from stress/acute stress. He asked his manager if he could produce medical certificates relating to the problems with his fingers but the manager refused this.

As no one was listening to him the claimant went to his solicitor who wrote to the manager on 10 March 2005. In her letter the solicitor set out the claimant’s position and asked that the claimant be re-instated to his former position or other suitable position. In his letter of reply on 23 March 2005 the Store Manager stated that one of the claimant’s duties as a sales assistant is to operate a till, that he was refusing to do so and that he would be subjected to a disciplinary procedure, which could lead to his dismissal. He further indicated that the claimant had not indicated in his application form that he was suffering from a physical handicap. The claimant was very hurt by this. He was writing to and phoning the respondent but getting nowhere. He felt he was “banging his head off a brick wall”. He was on €148.00 per week during this time and he had a mortgage and three children. He was very stressed about the situation. In a letter dated 23 March 2005 to the Regional Manager the claimant informed him about: his difficulties with the Store Manager, his disability which would be “a considerable handicap” for him on the tills, and caused him “extreme stress” and indicated his willingness to provide medical evidence and make himself available for independent medical assessment. The Regional Manager denied ever receiving that letter. By letters of 5 April 2005 and 10 May 2005 the claimant and his solicitor respectively indicated that the claimant wished to invoke the grievance procedure. This request was ignored in the Regional Manager’s reply dated 18 April 2005 and he informed the claimant that when he was fit he would be expected to operate a till. In a further letter to the claimant dated 24 May 2005, having received a letter dated 10 May 2005 from the claimant’s solicitor, the Regional Manager stated, “*On resumption of your employment I will arrange to meet you and discuss your situation*”.

When the claimant was certified fit to return to work he contacted HR and asked that he be rostered to work in an area other than the tills until after the proposed meeting (for which no date had been given by the Regional Manager) but he was told that he would have to work on the tills until they sorted it out. The claimant did not agree to this as he felt that he would be left on the tills. By letter dated 10 June 2005 the claimant’s solicitor asked the Regional Manager to confirm to her in writing, within five days, that he would carry out an investigation in accordance with the grievance procedure and informed him that in default thereof the claimant would consider himself constructively dismissed. There was no reply to this. It had been indicated to the respondent either orally or in correspondence between the parties that the claimant would work in any department (which did not involve handling small items such as coins) within the store or in any store in the area but the respondent did not accede to his request. The claimant felt he had no option but to resign as the matter had not been resolved and his managers refused to meet with him or to discuss alternative work with him. By letter dated 20 June 2005 the claimant submitted his resignation.

In cross-examination the claimant accepted that his contract stated that he was a sales assistant and that he had agreed to work in all departments; however when he had made the company aware of his disability at his interview he was assured that it would not be a problem and he was told to sign the contract. Had he been told at the interview that it would be a problem he would have walked

away. He was due to start training on the tills on the 1 March 2005. He tried to have a meeting that morning in relation to his difficulties. He had two meetings with the Store Manager, one on 22 February 2005 and the other on 1 March 2005. While the Regional Manager may have been in the store every Monday the claimant only saw him there once every three weeks.

Respondent's Case:

The first witness was the Store Manager. In February 2005, he needed to transfer the claimant to the tills based on the business needs at the time. Staff were moved from department to department within the store and the respondent was contractually entitled to do this. He did not know that the claimant had any condition that would prevent him from doing his full range of duties. He advised the claimant that he was being transferred. The claimant did training on the tills on 21 February 2005. On his second day on the till the claimant told him that he was "uncomfortable" on it and he wanted to move. The witness told the claimant that he hadn't given it enough time to settle in to the job.

The claimant was on sick leave for a week. On his return he told the witness that he was unhappy and did not want to work on the tills. The witness never refused to accept the claimant's medical evidence or to meet with him. The witness had several meetings with the claimant, all regarding the same issue and along the same lines. Part of the duty of a sales assistant was to work on the tills and that was what the respondent required him to do at that time.

Under cross-examination, the witness accepted that the claimant had never said that he didn't want to work on the tills but that he was unable to do so. There were up to one hundred and sixty sales assistants in the store. He needed to move the claimant to the tills because he needed experienced staff there. He accepted that the claimant had no experience working on the tills. The witness did not revise his decision to relocate the claimant as it was part of the claimant's contract to work in any department in the store. He made the decision and he is known to rarely change his mind. He assumed that if the claimant had had any difficulties that they would have been disclosed in his application form. The witness had checked the claimant's file.

There were about twenty tills in the store and 65 to 70 employees work on them. Not all staff had worked on tills. The store had a policy to employ staff with disabilities and these were located in areas where they would be most comfortable working. The witness did not think of verifying the claimant's condition by an independent medical source. He did not think that the claimant was untruthful regarding his difficulties.

The second witness for the respondent was the Regional Manager who is responsible for the respondent's stores in Limerick, Tipperary Clare and Galway. The Store Manager deals with the day-to-day issues that arise in the store. He denied having received the claimant's letter of 23 March 2005 or the solicitor's letter dated 21 July 2005. He first became aware of the claimant's situation when he got the claimant's letter dated 5 April 2005 containing a request to "avail of the company's grievance procedures". He made enquiries regarding the claimant's situation and discovered that a solicitor's letter had been received regarding the problem. He replied to that letter stating company policy and that he was not aware of the claimant's personal situation at the time. At some point in time all sales assistants are required to work on the tills as set out in their contracts. Having seen the claimant's letter of resignation dated 20 June 2005, he wrote to the claimant on 30 June 2005 to tell him he was not accepting his resignation, that he was holding his position open until 7 July 2005 and asking him to reconsider his position and to contact him to arrange a meeting. Having written to the claimant on 24 May 2005 the Regional Manager expected

to meet him. He was anxious to meet with the claimant and he made himself available to discuss the situation. He never received a call from the claimant. He never refused to meet the claimant. He felt that the claimant had an opportunity to approach him while he was present in the store on Mondays.

He agreed that the claimant had a good employment record and that there were no issues recorded in his file. He realised that the claimant was suffering stress from his medical certificates. He discussed the solicitor's letter with the Store Manager. He sought out the claimant to discuss his situation but the claimant was out of work on sick leave for a number of weeks at that stage. The claimant would have needed to resume work to discuss the matter further. If he had returned to work he would have been required to work on the tills. He did believe that the claimant's difficulties were genuine and wished that the claimant had approached him before resigning to resolve the matter.

Determination:

The Tribunal is satisfied that the respondent received all correspondence sent to it by the claimant's solicitor. The Tribunal accepts that the claimant's physical problems would make it difficult and embarrassing for him to work on the tills. Notwithstanding his application form, the claimant's evidence, that he raised his disability at his interview and was assured that it would not be a problem, was not contradicted by the respondent. The Tribunal notes that the claimant made numerous efforts over a protracted period to resolve the issue with the respondent and indicated his willingness to work in any other department (which would not involve his handling small objects such as coins) or in any of the respondent's stores in the area. The Tribunal finds that the respondent was unreasonable in adopting a rigid approach and failing to give any consideration whatsoever to the claimant's problem. In light of the acute stress suffered by the claimant as earlier certified by his doctor and his later request to invoke the grievance procedure it was unreasonable on the part of the respondent to insist that the claimant resume work before meeting him. Accordingly, the Tribunal finds that it was reasonable for the claimant to resign in the circumstances. The Tribunal further finds that the respondent's letter of 30 June 2005 was too little too late. Accordingly, the claim for constructive dismissal under the Unfair Dismissals Acts 1977 to 2001 succeeds and the Tribunal awards €7,750 in compensation.

This being a claim for constructive dismissal the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 is not allowed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)