

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1275/2005

MN946/2005

WT433/2005

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: Mr. T. Halpin B.L.

Members: Mr. M. Flood
Mr. F. Barry

heard this claim at Dublin on 2 February
and 5 April 2007

Representation:

Claimant:

Mr. Frank Maunsell, ATGWU,
55/56 Middle Abbey Street, Dublin 1

Respondent:

Ms. Laura Wyse, A & L Goodbody Solicitors,
IFSC, North Wall Quay, Dublin 1

The determination of the Tribunal was as follows: -

Dismissal being in dispute in this case it fell to the claimant to establish the fact of dismissal.

The respondent employed the claimant as a hospital porter from some time in 2000. The employment was uneventful until the incident in January 2005 which ultimately led to his resigning his position on 19 September 2005 when a recommendation to dismiss him was under consideration by the Chief Executive Officer (CEO) of the respondent. The claimant, who worked night shift, requested annual leave on Tuesday morning 18 January 2005 from the assistant manager portering services for the night of Sunday 23 January 2005 for the purpose of attending a

function. This request was refused on 21 January 2005 and a shift swap suggested as an alternative; this proved impossible to organise. The claimant did not attend work on Sunday 23 January 2005. His brother in law telephoned the respondent to say that the claimant's infant child had been taken to Crumlin Hospital (CH) in an emergency. As a result of this failure to attend work the claimant was summoned to a meeting on 28 January 2005 to enquire into his absence from work. The Manager Porter Services (MPS) conducted this meeting; the claimant's shop steward was in attendance. At this meeting the claimant's story about his child was disbelieved and MPS said he would telephone CH to verify the claimant's assertion. The claimant's shop steward disagreed with this but the claimant then gave his assent to MPS's proposal. MPS on speaking to CH ascertained that, while there was no record of the child being in CH on 23 January 2005, the child had undergone elective surgery on Tuesday 25 January 2005. MPS told the claimant he required proof of the claimant's assertion adding that he could not resume work until the matter was clarified.

The claimant was then called by MPS to a further meeting on 3 February 2005. At this meeting he produced a letter from CH stating that the child was in CH A&E Department on Sunday 23 January 2005. The claimant's shop steward was again in attendance. MPS now accepted the claimant's explanation and the claimant was allowed to return to work with no loss of pay.

The claimant was then called by MPS to a further meeting on 17 February 2005 attended by his shop steward and his full time official (FT). At this meeting MPS stated that nobody at CH knew the name of the person who signed the letter dated 2 February 2005 giving details of when the claimant's child attended CH. The claimant related how he had collected the letter from CH at the main gate after making several telephone calls to CH's patient services about the matter. He did not know who had signed the letter. The shop steward and FT both requested MPS to take the matter no further but MPS was insistent on checking the authenticity of the letter.

The claimant was called to a further meeting with MPS, again attended by his shop steward, on 19 April 2005. MPS asserted that the letter of 2 February 2005 had not been issued by anybody with the authority to do so. The claimant again insisted that he obtained the letter in the way he described at the meeting of 17 February 2005. MPS asserted that the claimant's child was not at CH on the night of 23 January 2005. The claimant's shop steward told MPS that he intended to take a grievance to Human Resources (HR) about this matter. MPS stated that he was putting the claimant off duty pending further investigation. The claimant accused MPS of bullying him. In the event the claimant continued on duty.

Following further investigations by MPS with CH as a result of which the authenticity of the letter of 2 February 2005 was put in doubt the claimant was called to a meeting by the Employee Relations Manager (ERM) on 25 August 2005 attended by MPS, the claimant, FT and a minute taker. This meeting again discussed the authenticity of the letter of 2 February 2005. Despite protest from FT about the time it had taken to get to this point the claimant was put on paid suspension until an appeal could be held. There is a handwritten note from ERM on the typed notes of this meeting to the effect that the claimant was told at this meeting that this was a very serious matter with potentially very serious consequences for the claimant.

As a result of this meeting a recommendation was made to the CEO that the claimant be dismissed. This appeal was to be heard on 19 September 2005. Before the appeal was heard FT approached CEO and asked if the claimant could be allowed to resign, CEO acceded to this request and the claimant submitted his resignation on that day.

Determination

The present case has arisen as a result of the claimant being forced to resign his position as night porter with the respondent, and accordingly he is claiming constructive dismissal.

Constructive dismissal is defined as a dismissal which is inferred where it is reasonable for the employee to terminate the contract of employment because of the employer's conduct and Section 1, at the definitional part entitled "dismissal" and paragraph (b) of the Unfair Dismissals Acts, 1977 to 2001 provides that:

"dismissal", in relation to an employee, means — the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer...

From the above statutory definition it is reasonable to conclude that an unfair indirect dismissal or constructive dismissal occurs by, or as a result of, the employer, creating such conditions so intolerable and unreasonable that an employee feels compelled to resign from the employment.

Notwithstanding that the claimant resigned and such resignation being acceptable to the Superannuation Section of the respondent the Tribunal accepts that the resignation was not one made freely and voluntarily having regard to the evidence as set out above.

The Tribunal finds that MPS hotly pursued the claimant in respect of what he perceived to be gross misconduct and the manner in which he dealt with this fell short of acceptable behaviour and conduct. The creation by an employer of conditions so intolerable and unreasonable that an employee feels compelled to resign from the employment constitutes 'constructive dismissal'.

The relentless pursuit of the claimant by way of meetings and investigations and the way same were conducted were a breach of the claimant's rights and entitlements. Moreover, at the meeting of 3 February 2005 the MPS accepted the explanation and the letters and thus the practices and procedures of the disciplinary procedure, rightly or wrongly, do not allow the respondent to further investigate matters and thus the investigation process was *res judicata* and MPS as an investigator was *functus officio*, that is by his own acts he was devoid of authority to continue the investigation. Moreover, there was no creditable evidence to prove that the claimant was guilty of any wrongdoing. In assessing the gravity of the wrongdoing from the perspective of the respondent, one has to have regard to the punishment imposed upon the offender and also the age and the length of service of the employee, the hospital failed in this regard.

Having regard to all the matters aforesaid the Tribunal finds that the Claimant was entitled to dismiss himself from the employ of the respondent. Accordingly, the Tribunal finds notwithstanding the purported resignation, that the Claimant in the instant matter has been unfairly dismissed within the meaning of the Unfair Dismissals Act 1977 to 2001.

In *Wetherall (Bond St. WI) v. Lynn (E.A.T.)* [1978] 1 W.L.R. 200, at page 206, Bristow J. stated that:

Entitlement to terminate a contract by reason of the conduct of the employer is a perfectly familiar concept of the law of contract. Like much else it is easy to formulate but can be difficult to apply...The law of contract for this purpose is that where an employer so conducts himself as to show that he does not intend to be bound by the contract of employment the employee is entitled, at his option, either to treat the contract as at an end, and cease performing his part...The question of what is reasonable in the circumstances having regard to equity which has to be considered in cases of unfair dismissal, applies equally to the facts

Bristow J. went on to say that:

It is the conduct of the employer which you must look at...but it is not the epithets which his conduct attracts, but whether you are entitled to treat your contract as at an end, and whether if you exercise your option to do so you have been 'constructively dismissed.'

The Tribunal finds that the Claimant herein had been constructively dismissed. In constructive dismissal cases the only conceivable remedy is an award of compensation unless the factors giving rise to the intolerable situation can be totally and fully removed from the workplace. The Claimant is now presently engaged in gainful employment and so compensation is the preferred remedy. The Claimant secured work in or around the 6 March 2006 and thus his loss seems to commence in or around the 29 September 2005, which gives an approximate figure of €12,500. Accordingly, the Tribunal awards compensation in the amount of €12,500.00 under the Unfair Dismissals Acts, 1977 to 2001. This being a case of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts 1973 To 2001 does not arise. No evidence having been adduced, the claim under the Organisation of Working Time Act, 1997 must fail.

That concludes the determination of this Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)