

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD1008/2005

MN760/2005
WT330/2005
RP470/2005

against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr D. Moore
Ms. B. Fell

heard this claim at Kilkenny on 11th April 2006 and 5 January 2007

Representation:

Claimant(s): Ms Elaine Morgan B.L. instructed by;
David M. Dunne & Company, Solicitors, 31 Rose Inn Street, Kilkenny

Respondent(s): Mr Paul Kavanagh B.L. instructed by
Butler, Solicitors, 10 Lower Patrick Street, Kilkenny

The determination of the Tribunal was as follows:-

Respondent's Case

The respondent's business involves cutting large slabs of cheese into smaller portions and packaging these for co-operatives. The respondent has approximately fourteen employees in the business. The factory was divided into three sections: the high risk (HR) area, the low risk (LR) area, and administration.

There is a controlled atmosphere in the HR area as the 20kg blocks of cheese are exposed and the cheese is cut up there. Employees who work there wear specialized white gowns, caps and shoes.

If an employee in the area leaves for any reason he/she has to first de-gown. It is here that the cheese is cut into smaller portions. A blue coloured gown identifies employees who work in LR area. They cannot cross into the HR area. They also wear protective clothing. Both areas are separated by a holding bay/airlock. Cheese in the HR area is moved by forklifts and placed on plastic pallets; cheese in the LR area is placed on wooden pallets. AC was the claimant's supervisor. AC's father (DC) is a company director and he deals with day-to-day running of the factory. MB, the other director, deals with administration.

The claimant was employed by the respondent from March 2001 as a store man and forklift driver. He worked in the LR area and wore the blue gown that all others in the LR area wear. The claimant's function as a store man was to store the pallets of cheese in racks in the fridge until it was needed. When cheese was needed the claimant stripped it and put it into the airlock; if he was not busy he would move some pallets. It was his duty to keep cheese in the airlock at all times. HR personnel are not allowed into the area for reasons of hygiene.

On the 20th May 2005 MB came across the claimant in the LR area. The claimant immediately asked him for a letter for the dole office. There had been a row between DC and the claimant over pallets of cheese in the airlock. The claimant said he could not be in two places at one time. MB listened to the claimant and then asked him to take 20 minutes out to calm down. The claimant returned after a time and again asked for a letter for the dole office and his P45. MB then asked the claimant, as a personal favour, to take a tea break and think about it. After that the claimant again requested the letter and P45. MB gave the claimant the letter for the dole office but requested him to return the following week for his P45. The claimant was determined to leave at that stage. The claimant was on the premises for approximately 2.5 hours at that stage. When he returned for his P45 the following week they shook hands and MB wished him the best of luck. The claimant did not mention at that stage that he had written to the EAT.

In cross-examination MB accepted that following the incident of 20th May 2005, a return to work would be impossible for the claimant. He could not comment on whether or not the claimant was told to stop what he was doing and get the cheese from the LR area that morning. MB did not make any enquiries or carry out any investigation after the incident. MB could not accept that the claimant was in an impossible situation when he received two different instructions because the claimant knows that the priority is to keep the production lines operating. The claimant was not given a written contract and the company had no grievance procedures in place.

DC became aware that all the lines were stopped because the employees in the HR area had no cheese and there was none in the airlock. He went to the claimant to find out what was wrong. When he got to the fridge area two other employees were also there looking for cheese. The claimant was there and smelled of alcohol. DC asked the claimant to get the cheese to the lines. The claimant told him that he could not be everywhere. DC told him that he did not expect him to be everywhere only just where he was needed. The claimant never told him that he had instructions from anyone else at that stage.

DC asked the claimant twice to come with him but the claimant refused. He told the claimant that if he could not follow instructions there was no work there for him. The claimant took off his overalls at that time. DC denied that he assaulted the claimant as alleged or that he pushed the claimant on the shoulder to get his attention to come to his office.

DC denied that he dismissed the claimant. The claimant had drink on him that morning and when he had drink he was difficult to handle. DC's son was the claimant's superior and the claimant had

to take instructions from him. DC denied that he came into the area shouting. He accepted that the claimant was under instructions from someone else but stated that getting cheese into the airlock area was the priority. There was no one else available to put the cheese in the airlock. He tipped the claimant on the shoulder to get his attention because the claimant had walked away from him twice. DC denied that he physically grabbed the claimant.

On the 26th June 2005 DC went to the claimant's house and spoke with his mother who informed him that the claimant was away and would not be back until the following week. DC told her that he was there to offer the claimant his job back. He met the claimant on his return visit to his home on 4th July 2005. He invited the claimant back to work and told him that he would reimburse him for any loss he had suffered but the claimant was not interested. No condition was imposed on his offer to the claimant to return. He offered him his job back with back money in an attempt to resolve the situation, not because he felt that he had wronged the claimant. DC made the offer to save the hassle of Tribunals; he didn't want to go that road.

Claimant's Case

The claimant told the Tribunal that he was employed by the respondent from March 2001 as a store man. AC was his supervisor and he took instructions from him. His job was to receive cheese in the store and put it into the store fridge in racks. When cheese was required he would take a pallet at a time, strip the cheese and put it into airlock for the HR area. There were two fridge areas.

On 20th May 2005 the claimant reported for work at 7.00a.m. He put cheese into the airlock for the workers in the HR area and then went about his other duties. At 8.00a.m. AC asked him to get pallets of cheese from the second fridge ready. TON then came for cheese from the second fridge as well. When he got to the second fridge the pallets from the previous day were scattered all over place and he and TON set about clearing up the area. Fifteen minutes later another employee (AD) came in and asked the claimant if he would move pallets. The claimant asked AD if she could wait a few minutes until they had finished.

At that stage DC came in and having got explanations from both AD and TON as to why they were present in the area DC asked the claimant where was the cheese for the Kilmeaden line. The claimant replied that he had put the cheese in the airlock and that there should be enough there for the workers to carry on. When DC told him that there was no cheese in the airlock the claimant told him that there was cheese in the store fridge which had been already stripped and that they could come and get it. DC told him in an aggressive and high-pitched voice that "they would not get anything" and that he (the claimant) was to get it. The claimant told DC that he could not be in two places at the one time nor obey two instructions at the same time. The claimant explained to DC that he was trying to obtain the cheese for TON. DC asked the claimant twice to come with him and when the claimant refused DC grabbed him by the collar of his overall and pulled him forward. The claimant requested DC to take his hands off him, which he did. DC again asked the claimant to accompany him to the office but the claimant refused. DC then said to him, "There is no work here for you". The claimant began to take off his overalls. A number of employees heard the altercation. AD and TON were outside the fridge door. MB came to the area. The claimant approached MB and asked him to give him something in writing stating that there was no work for him. MB agreed and asked him to come to his office for it.

When the claimant reached the office he was upset. At MB's request the claimant told him what had happened and he (MB) wrote it down. MB suggested to the claimant that he have a cup of tea in the canteen and offered him €50 for a cup of tea and a sandwich, which the claimant refused. At

MB's request the claimant sat in his the car for about twenty-five minutes while MB prepared the letter. AD came by the car and asked him what had happened and he told her he was sacked and was waiting for a letter. He returned to MB's office around about twenty-five minutes later and got the letter from MB. MB did not give him a copy of the notes he had taken during his earlier visit to the office and told the claimant that he did not need them.

The claimant told the Tribunal that he had enjoyed his work and had not intended leaving. Twenty-one employees were employed when the claimant started and it was a very close-knit company where everyone helped each other. The claimant relayed an incident, which occurred eight months previously. When a comment was made to him about his nationality and his ability to work, he threw a stripper at the person who made the comment. However both of them later apologised to one another and shook hands. He received a verbal warning from the respondent due to the incident but it was not a live issue at the time of his dismissal.

The claimant, who was away on DC's first visit to his home, spoke to DC on his second visit. He was offered his job back but he declined the offer. DC did apologise to him. After the 20 May 2005 the claimant was out of work for some considerable time. He did well at interviews but as soon as he informed the interviewer of what had happened he knew that he would not be contacted. He agreed that DC did not strike him but he pulled him forward by the collar. He would prefer to go to MB than to DC to sort a problem.

He had no doubt but that he was dismissed. He asked Mr. MB for a letter to state that there was no work available for him. The two written accounts of the incident on 20 May 2005 were not exactly the same because his father wrote one of them. He was out of work for a year and he received €140 per week from social welfare. He attended FAS on a regular basis. From June 2005 until June 2006 he was unemployed. He applied for at least twenty to twenty five jobs. He agreed that MB facilitated him by giving him a letter at his request on 20th May 2005.

Determination

Having heard all of the evidence in this case the Tribunal finds that it was reasonable for the claimant to believe from the words uttered by DC on 20th May 2005 that he was dismissed. Furthermore, when the claimant approached MB for a letter for Social Welfare, MB made no attempt to clarify the position. The Tribunal finds that the incident did not warrant dismissal and accordingly the dismissal is unfair. In the circumstances of the case the Tribunal finds that it was not unreasonable for the claimant to turn down the offer to return to work with the respondent. The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. However, the claimant did make a minor contribution to his dismissal. The Tribunal, having taken this contribution into account, awards the claimant compensation in the amount of €13,000 under the Unfair Dismissals Acts.

The Tribunal allows the claim for minimum notice and awards the claimant compensation of €702.00, which is equivalent to two weeks' gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

As a claim under the Unfair Dismissals Acts, 1977 to 2001 and the Redundancy Payments Acts, 1967 to 2003 are mutually exclusive the claim under the Redundancy Payment Acts, 1967 to 2003 is dismissed.

The claim under the Organisation of Working Time Act, 1997 was withdrawn, by counsel for the claimant, at the outset of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

