

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee

against

3 Employers

under

CASE NO.

MN640/2006

UD976/2006

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. Behan BL

Members: Mr. P. Casey
Mr D. McEvoy

heard this claim at Cork on 11th October 2007
and 7th December 2007

Representation:

Claimant : Mr. Barry Sheehan, Barry Sheehan, Solicitor, "Ravensdale", Church Road,
Douglas, Cork

Respondent : Mr. Barry Turnbull, Barry Turnbull & Co., Solicitors, 33/34 Washington Street West,
Cork

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

Claimant's Case:

The claimant gave evidence. He explained that he had commenced employment with the respondent on July 24th 1999 on a part-time basis. He commenced full-time employment with the respondent in 2002. He had no contract of employment, did not receive any payslips and only received a P60 after contacting his solicitor.

He explained that he had requested a P60 in August 2005 as he and his partner wished to secure a mortgage but was told by the Director of the respondent company (known as E) that the accountant was dealing with it. He discussed the matter with his solicitor who advised him to contact the Revenue Commissioners where he discovered that he was not registered. His solicitor also wrote to the E requesting a contract of employment for his client. The reply received stated that the respondent

company would only go back two years of the claimant's employment for revenue purposes.

The claimant told E to get his affairs in order or he would oppose the respondent's upcoming gaming licence application. The claimant's working hours were reduced to twenty hours a week. Two other staff completed his original working week. He received his P60's after the second gaming licence application in December 2005. The gaming licence was granted. He appealed the licence. E informed him that if he withdrew his appeal he would offer the claimant one year's redundancy.

The claimant explained that he had worked on the first floor on the respondent's premises but it was an unsafe environment. Previously he had worked downstairs in the cash office. He contacted the Health and Safety Authority. Remedial work was ordered to be carried out. He took a claim before the Rights Commissioner under the Terms of Employment (Information) Act, 1994 and the Organisation of Working Time Act, 1997. He was paid what the Rights Commissioner had recommended.

E wrote to the claimant on a number of occasions concerning his attendance at work. The claimant explained that his mother was a diabetic and needed to attend her doctor weekly. His father had also been ill. He stated that he had missed eight days work in six years. When asked, he said that the subject of his work attitude and conduct had not been raised with him in the past.

On April 28th 2006 he received a letter from E questioning his absences, mainly on Wednesdays, and his attitude towards his supervisors. When he received the letter he contacted the Manager (known as T) asking if he was fired. T did not know. He requested his P45 and P60 but was told to contact E. He never made contact and was never asked to return to work. On May 18th 2006 he received a letter enclosing the monies owed to him and his P45 and P60. When asked, he said that there had been no allegation made to him regarding theft and had never been in trouble with the Gardaí. He was not aware of a complaint made by E to the Gardaí.

The claimant gave evidence of loss. He signed on for a year and then commenced a FÁS course.

On cross-examination he explained that he had attended college while working for the respondent. He finished college in 2002 but not the course. He worked seven days a week, five hours a day. When asked, he said that he had asked for a job for his friend (known as O).

When asked, the claimant said that he had taken a few foreign holidays over a period of five years. When asked he said that at the time his wages were higher than €127.50 per week. This was the weekly wages he was paid for the last six months of his employment with the respondent. When asked, he stated that the Gardaí had interviewed him in early 2006 concerning the gaming machines. The claimant said that he had been aware that the float had been short on a number of occasions but he had not taken it. When asked, he said he did not know why he had been removed from working in the cash office. He agreed that O had been convicted of stealing. He refuted CCTV had caught him putting money in his pocket from the till.

Eight dates of absence were put to the claimant and he agreed he had been absent. He told the Tribunal that he had been ill towards the end of his employment. When put to him, he stated that the letter dated April 28th 2006 looked like a letter of dismissal to him and told T he had been fired.

When put to him, he refuted that he had stolen money, had lived beyond his means and had tried to extract money from the respondent company. He stated that he was given extra hours to work when staff were out.

On re-examination he stated that E lived twenty minutes away from the respondent's premises. If a

customer had a substantial win, E was contacted and would pay out. Small wins were paid from the till. He said that he had not known that CCTV had been installed. He explained that he had gone on a few foreign holidays but that his partner was earning a lot more money than him.

His Rights Commissioner hearing had been in April 2006. When asked why he had submitted the T1A form to the Employment Appeals Tribunal sooner, he said that he was under instruction from his solicitors and had to sort out his affairs.

Respondent's Case:

The Director of the respondent company (E) gave evidence. He explained that the premises the claimant had been employed in was a casino and amusement arcade. He explained that he now employed seven staff but when the first floor of the premises was in operation there had been more.

The claimant had been employed on a part-time basis cleaning the premises. His hours of work fluctuated. The claimant had been absent on more than eight occasions over his period of employment. He commenced full time work in 2002 and began working in the cash office.

The cash floats were checked and the amounts were significantly reduced. It was very unusual and if it continued the premises would close. He had reason to believe the money was stolen. CCTV had been installed over a weekend in July, the staff were unaware. The claimant and O worked together a lot.

He explained that if a customer had a win the attendant would pay out. The amount would be written in the book and tallied by the hour. On one occasion the claimant had finished his shift and when the books were tallied it was discovered that the float was down €100. When asked, at the time, the claimant said that he had forgotten to write the win in the book. The witness explained that T mainly dealt with the claimant as he was his supervisor.

On August 21st 2005 the witness arrived for work at 6.30pm, O was on duty. He went to the office and observed O in the cash office by CCTV. During the time he was watching four €50 notes were taken. The following day the claimant was working. There was a €100 note in the till which was very unusual. He observed the claimant with the note in his hand. The claimant did not work in the cash office after this. Since the claimant and O had been removed from the cash office, profits had improved. The witness told the Tribunal that customers had complained about the claimant in the past.

T had approached the witness telling him that the claimant would not carry out the duties requested of him. The claimant said that he would do it in his own time. T asked the witness to talk to the claimant. When he did the claimant told him that T had not asked him to do the work in a nice way. The claimant had considerable absences during March and April. The witness contacted the Department of Enterprise, Trade and Employment for advice. On April 28th 2006 he wrote to the claimant about these issues.

T contacted him on May 2nd 2006 and informed him of the call he had received from the claimant saying he was fired and requested his P45 and P60. The witness said that it had taken him time to organise the documentation.

When asked, he said that he had had suspicions about the claimant's "spending power". He brought in clothing bags from expensive shops on occasions. When asked, he explained that he had had a problem with the roof of the neighbour's premises and this was why the first floor was not open to the

public. He agreed that he had offered one years redundancy to the claimant as it appeared the claimant was not interested in working for the respondent. He explained that the claimant had still been employed during the time he had made complaints to the Health and Safety Authority, the Rights Commissioners, the Gardaí and various other bodies. He refuted that he had been running a restaurant from the premises but did offer hot beverages on the ground floor. He stated that all his tax affairs were in order. He had not dismissed the claimant, he had walked out.

On cross-examination he said that the claimant had not received his contract of employment as he left before he could be given it. The claimant had never asked for a payslip. In 2005 the claimant had been regularised for tax and PRSI purposes. When asked he said that he had not told the claimant that he would only go back two years for P60 purposes. When asked he said that he had made an offer to the claimant and O to drop the Gardaí complaint re: theft if he withdrew the gaming licence appeal and requested a certain amount of money from each of them. The witness told the Tribunal that he just wanted the money back that had been stolen.

When asked, he agreed that he had taxation problems in the past and previously had an offshore account but that the matter had been settled. He explained that the claimant had originally been employed to do the cleaning.

When asked if he had used a disciplinary process, he replied that he had spoken to the claimant and had put the issues in writing. When put to him, he said that he had been aware that the claimant had been a witness in the criminal case against O. When put to him he said that would not believe that the claimant had been shouted at and bullied.

The assistant manager gave evidence that he has been with the respondent for fifteen years and that on most Wednesdays the claimant did not turn up. Prior to his employment ceasing he was not turning up for work and might phone the odd time. The claimant told witness he had been let go and as far as witness was concerned he did not tell him and knew nothing about the letter dated 14th September 2006. At the start he was working okay and then things went downhill.

Another witness gave evidence that he has been with the respondent for thirty years. The claimant was okay as an employee but for the few weeks before he left the deterioration started. He was not aware of the dismissal letter.

Determination:

The letter of 28th April 2006 was a warning letter and does not constitute a letter of dismissal. The Tribunal does not find any evidence to support the claim that the claimant was constructively dismissed. The claims under the Unfair Dismissals Acts, 1977 to 2001 and the Minimum Notice and

Terms of Employment Acts, 1973 to 2001 are dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)