

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

MN534/2006
UD809/2006

against

Employer

under

**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

Members: Mr. P. Casey
Mr D. McEvoy

heard this claim at Cork on 28th September 2007

Representation:

Claimant :

Barry M. O'Meara & Son, Solicitors, 18 South Mall, Cork

Respondent :

Kelly & Dullea, Solicitors, 5 South Mall, Cork

The determination of the Tribunal was as follows:-

Respondent's case:

The respondent's business is in construction

The managing director in his evidence told the Tribunal that on Tuesday 30th May 2006 he was told that a fight was taking place at the top of the scaffold. When he got to the site the fight was over and one of the employees was being attended to. He enquired as to what had happened and discovered that the claimant was also involved in this incident. He told the two men to go home asked them for statements and would then arrange a meeting. Copies of these statements were submitted to the Tribunal. The employee referred to as P threw the first punch with the claimant throwing back and while two other employees came up the scaffold they were at the bottom when

the incident took place and did not therefore see what happened. Witness was concerned that if one of the men had fallen off the scaffold the whole business was finished and there would be no more employment. The scaffolding had been erected correctly.

At the meeting with the two men and their union representative it was apparent that P's face and neck were bruised however the claimant said this was not of his doing. All the employees had safe passes. The claimant's statement was read and no decision was given at that point. P told of bullying and intimidation. This was the only site the respondent had therefore there was no place else to re-deploy staff. While the claimant was an excellent plasterer and the union representative asked that both he and his colleague be kept on, witness feared this situation would erupt again therefore he dismissed both men.

In cross-examination witness said that the first he heard of tensions amongst the staff was after these current events and that the boss is usually the last to know about these things. He asked other staff at that point and they told him what had been happening. He told the staff his door was always open if they wished to discuss any matters. Witness did not consider giving a warning as there would be a risk of a similar incident happening again. The claimant's colleague P returned to working with the respondent six months after he was dismissed and as of the date of this hearing the respondent has other sites.

The employee referred to as P in his evidence said he punched the claimant first and the punch was returned by the claimant. On the day in question he had worked all day on the gable of a house and the claimant maintained that one part of the job was not done properly to which witness responded that as far as he was concerned there was nothing wrong with the way he did the job and he told the claimant to "f--k off". The claimant kept on at him and he threatened to hit him if he did not go away. He hit the claimant and the claimant struck back in response. Witness has a safe pass and has spent all his life doing building work. He knows the job from every safety angle and everything is in order and safe. He knows that serious injury or death could have occurred. He was a bit dazed and his son came and pushed the claimant off him. Some of his colleagues took him to the office and he was sorry for what had happened. He was asked to make a statement and bring to the office.

The union representative was present at the meeting and having read the claimant's statement he felt it was an accurate enough account of what had happened.

In relation to the harassment witness said that after he returned to work following an operation he felt that the claimant was a changed man. The claimant kept telling him he was not doing his job the right way however witness ignored his comments. Others kept making smart comments to him but he ignored them. When he returned to work for the respondent following his dismissal he was not given a caution and the conditions were the same as previously. He had no problem working with the claimant but if witness saw something wrong he would not stand for it. Witness would not bully anyone.

In cross-examination witness said that although he threw the first punch there had been a culmination of incidents rather than the one incident referred to during the hearing of this case. He was not the aggressor.

The son of the previous witness also gave evidence. He heard the incident on the day and saw the respondent coming to the site. He and his colleagues were told to go home.

In answer to questions from Tribunal members as to whether he was aware of tensions between his father and the claimant he said that about two months prior to the incident on 30th May he saw the

masons rising the two of them. There were lots of little things that happened on site and it was a combination of things. He did not expect an incident to occur three floors up. There was one punch from his father and one from the claimant.

The respondent confirmed that his father returned to work for the respondent four months after his date of dismissal.

Claimant's case:

The Tribunal heard evidence from two other employees who worked with the claimant. One heard the argument on the day in question and saw the wrestling on the top of the scaffold. Neither had any problem working with the claimant.

In cross-examination one agreed that a fight should not happen on top of scaffold and was aware of the dangers and the sanction should a fight occur there. The other witness was not aware of other employees having problems with the claimant.

The claimant in his evidence said he had been in the plastering trade about twenty eight years and had been with the respondent about eleven years with a 2003. Prior to this incident there had been no problems. P asked him the previous day about leading on a chimney and that evening he took the opportunity to give his opinion. P was on the scaffold near the chimney and accused him of picking holes in his work. The claimant came down on to the scaffold from the roof and P threatened to hit him. The claimant was standing in front of him, put out his hands and got a punch in the mouth. The claimant hit him back and pulled him to one side. P's son was coming up on the outside and another colleague arrived on the scaffold. Gibes were thrown at the claimant about his personal life with P saying he had hit an old man. The claimant went out onto the next roof as planned and the office was contacted.

About twenty minutes later he was told the managing director wanted to see him. The managing director said he was surprised and the claimant explained what happened. The claimant was asked if he had any injuries but there was only a cut to the inside of his lip. Both the claimant and P were sent home, and were told they were to be kept off site. This was Wednesday and the respondent said there would be a meeting on Friday. The claimant did not receive any contact and he rang the office on Friday am leaving a message for the managing director. He then got a call to come to the office and he handed in his statement. The claimant asked to have his union representative present. The claimant was told his statement was the most accurate and was told he would get an opportunity at the meeting to read the other statements. He outlined how over the years he found it difficult to work with P. The claimant was given the impression that he would be suspended for a few days or a week. He was then told he would be called back later and at around 3.30pm he was told the bad news that he was being dismissed. He was told P did not want to come back and that his son did not want to work with the claimant. The claimant was stunned.

The claimant is now self-employed and was out of work for three months. He had never previously been involved in a physical incident and is married with three children. He would like to hear from the people who said he was a bully as he denies any such allegation.

In cross-examination when asked why he did not walk away he said he did not expect to get hit. He did not initiate the fight.

In answer to questions from Tribunal members in relation to health and safety he accepted that a

fight should not be conducted on a scaffold.

Determination:

The two employees engaged in a fight in a dangerous situation two and half stories up, endangering both themselves and other employees and having no regard for health and safety. The claimant by his own admission did not take into account that they were on scaffolding. The procedures were fair in the circumstances of the incident and the dismissal was justified in the circumstances as outlined. His claim under the Unfair Dismissals Acts, 1977 to 2001 is dismissed. Taking into account the situation which arose the claimant is not entitled to notice therefore his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

