

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD801/2007
MN 637/07
WT 272/07

against

2 Employers

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. B. Garvey BL

Members: Mr. J. Horan
Ms. M. Finnerty

heard this claim in Dublin on 10 January 2008

Representation:

Claimant: Mr. Sean MacBride, O'Rourke Reid Law Firm, Pepper Cannister House,
Mount Street, Dublin 2

Respondent: Mr. Boyce Shubotham, William Fry Solicitors, Fitzwilton House,
Wilton Place, Dublin 2

On 9 January 2008 the Tribunal secretariat received a fax which contained the following:

“We refer to the above matter which is due for hearing before the Tribunal tomorrow.

Our Client will not be proceeding with his action. A claim for discriminatory dismissal has been lodged with the Equality Tribunal and our Client is electing to pursue his claim in that forum rather than at the Employment Appeals Tribunal. The Respondents have dealt with our Clients claims for lack of notice and holiday pay. The Respondents have been advised of our Clients position.”

The respondent's representative subsequently sent to the Tribunal a letter dated 9 January 2008 which contained the following:

“Please be advised that we wish to appear before the Tribunal tomorrow, Thursday 10 January 2008 at 10.30 am as the Respondent wishes to apply for costs under Regulation 19 of the Redundancy

(Redundancy Appeals Tribunal) Regulations 1968. The Respondent is of the opinion that the Claimant has acted in a frivolous and vexatious way by withdrawing the claim on the day prior to the hearing.”

At the beginning of the hearing of the said application the claimant’s representative said that he had counsel but had not been able to contact that counsel on that day.

Opening statement by the respondent’s representative

The respondent’s representative said that the respondent had a jeweller’s shop in central Dublin. Due to concerns about the condition of the store it was decided to send one of the respondent’s senior executives from the U.K. in early November 2006 to bring the store up to standard. It was alleged that the claimant left the store giving the keys to an assistant telling her that she was in charge and that she was not to co-operate with whoever was sent from the U.K.. When the respondent rang the claimant he said that he had been ill whereupon the respondent brought in someone from the U.K.. By January the respondent wrote to the claimant to say that he would be kept on the payroll but that he would have to be replaced if he did not come back from sick leave. Nearly six months later the claimant said that he was fit but there was no post there for him then. The claimant’s employment was terminated.

The claimant then brought a claim under the Unfair Dismissals Acts, 1977 to 2001, and a personal injury action. He also brought claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and under the Organisation of Working Time Act, 1997. As well as lodging, in August 2007, claims under the legislation cited above, the claimant lodged a claim under the equality legislation.

In November 2007 the respondent wrote to the claimant inviting him to withdraw his minimum notice claim and his claim under the Organisation of Working Time Act, 1997. However, the respondent then accepted that there was money due under the Organisation of Working Time Act, 1997, and paid it.

The respondent’s representative now told the Tribunal that under the employment equality legislation a worker could make an election e.g. if he proceeded with an unfair dismissal claim he would cease to have a right to proceed with a claim of discriminatory dismissal. The respondent’s representative said that the claimant had not made his election until 11.30 a.m. the previous day despite the fact that the claimant’s side had known all the relevant facts and that it would have to make an election. It was submitted that, knowing this, the claimant’s representative had waited until the last minute to withdraw the E.A.T. case and that the respondent’s side had initially thought that the claimant was only seeking a postponement before then seeing that it was a withdrawal. When asked, the claimant’s representative declined to explain and said he would explain to the Tribunal. The respondent’s representative contended that the claimant had not been vexatious ab initio but that it had been vexatious that the respondent had incurred legal costs in preparing the case. A schedule of the respondent’s costs and expenses was now furnished to the Tribunal.

The respondent’s representative argued that this case was abnormal in that the claimant’s side had chosen to wait before withdrawing its 10 January case. They had known since 22 November that they had to make an election. It was argued that, though the respondent had not been looking for costs, in these exceptional circumstances the Tribunal should exercise its powers to make an order for expenses and costs. It was submitted that the respondent should not incur further costs and the

Tribunal was asked to decline the claimant's representative's application for an adjournment.

Opening statement by the claimant's representative

The claimant's representative responded by saying that, though he did not have counsel available to him, he could probably deal with the matter himself. He went on to say that the first chance he had had to advise the respondent's representative had been 11.00 a.m. the previous day. On 18 December he and the claimant had met counsel but that the claimant had found it all hard to understand and had wished to consider his position.

(Asked to explain the gap between 22 November and 18 December, the claimant's representative said that he had sent details to the claimant and that he had been trying to set up the meeting between himself, counsel and the claimant.)

The claimant came back to the claimant's representative after Xmas. The claimant's representative's office opened on 3 January. They spoke on 3 and 4 January. The claimant got back to the representative and said that he was still confused. He wanted to think about his options over the weekend of 5 and 6 January. The three options were: a case at the Equality Tribunal; a case at the Employment Appeals Tribunal; and a personal injury action with a contract issue also.

When the representative did not hear from the claimant on Monday 7 and Tuesday 8 January he tried to ring him. The claimant came back to him late on 8 January and said that he elected to proceed before the Equality Tribunal. The representative stated that he "did not get Fry's that day" and that he "got delayed on Wednesday morning". He said that he got in at 10.30 a.m. and spoke to a named person at Fry's at 11.00 a.m.. He added that the Employment Appeals Tribunal secretariat were "advised directly after that" and that "reasons for the withdrawal were given" to the Employment Appeals Tribunal and to Fry's. He knew that the respondent would object to an application to adjourn the matter.

The claimant's representative told the Employment Appeals Tribunal that most cases in a standard textbook relating to the seeking of costs for vexatious conduct had no merit. Saying that there had been "no malice" from his side and "no attempt to be malicious", he said that he would prefer to deal with this application on 10 January "rather than let it drag on" and confirmed that his application to postpone this application for costs was withdrawn.

Submission by the respondent's representative

The respondent's representative submitted that the claimant's representative was "painting himself as the victim", that there had been "a long delay up to 18 December" and that "the claimant should have been told to make this decision quickly". He submitted that the respondent would incur costs given that the claimant had "pulled out" when he did so, that the claimant's "side" should have withdrawn sooner, that the respondent's "side" should have been told sooner and that this had been "vexatious".

Submission by the claimant's representative

The claimant's representative submitted that "the issue of delay is not a long one given the time of year" and that he did not believe the situation was a justification for an entitlement to legal costs. He added that, with regard to the claimant not coming back to him on 7 and 8 January, the claimant had been sick from 4 January.

Rejoinder by the respondent's representative

The respondent's representative replied that his client had "had to get out of his sickbed".

Determination:

Having considered this application in great detail, the Tribunal, by a majority (Mr. B. Garvey BL dissenting), does not award costs. The Tribunal is very conscious of costs being incurred by parties coming before it and would stress, particularly to the representatives, that parties should be apprised of these concerns particularly in the context of the possibility of claims arising under Regulation 19(2) of Statutory Instrument 24 of 1968 namely the Redundancy (Redundancy Appeals Tribunal) regulations, 1968 as amended by Statutory Instrument No. 114 of 1979 namely the Redundancy (Employment Appeals Tribunal) Regulations, 1979.

With regard to the claims lodged under the Unfair Dismissals Acts, 1977 to 2001, and the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and the Organisation of Working Time Act, 1997, the Tribunal notes that they were withdrawn.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)