

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

UD734/2008  
MN670/2008

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: Mr. D. Hayes B L

Members: Mr. F. Moloney  
Mr. B. Byrne

heard this claim at Dublin on 3<sup>rd</sup> November 2008

Representation:

\_\_\_\_\_

Claimant: Mr. Colm O'Connor of J.A. Shaw & Co. Solicitors,  
Marlinstown Business Park, Mullingar, Co. Westmeath

Respondent: No appearance or representation

The determination of the Tribunal was as follows:-

There was no appearance by or on behalf of the Respondent in this case. The Tribunal was satisfied that both the Respondent and its Solicitors had been notified of the hearing date by letters dated the 18<sup>th</sup> September 2008. Neither letter had been returned to the Tribunal as undelivered nor had the Respondent or its Solicitors contacted the Tribunal to suggest that the date might be unsuitable and no application had been made in that regard. In the circumstances, the Tribunal acceded to the Claimant's application to hear the case.

The Respondent owns approximately eighteen shops. The Claimant commenced employment in its Mullingar shop in February 2007. In January 2008 the Claimant

went on sick leave, which leave was certified. On the 13<sup>th</sup> March 2008 his doctor certified him as being fit to return to work. On the 14<sup>th</sup> March he telephoned his manager to inquire when he should return to work and was told that under no circumstances should he return to work. He was further told that he would hear from the Respondent's Solicitor. The Claimant told the Tribunal that he took this to mean that he should not return to work until he had heard from the Solicitor. It is clear that the Claimant did not understand the manager's words to constitute a dismissal and the Tribunal is satisfied that they did not amount to such.

As it turned out, the Claimant did not hear from the Respondent's Solicitor. His own Solicitor contacted the Respondent's Solicitor on the 28<sup>th</sup> March 2008 and was told that the Claimant could return to work once medical certificates covering the period from mid-February to the end of March 2008 were submitted. The Claimant submitted all relevant certificates but still was not permitted to return to work.

There followed correspondence between the solicitors, which ended with a claim being brought to the Tribunal. The T1A was lodged on the 24<sup>th</sup> June 2008. A T2 was lodged on the 5<sup>th</sup> August 2008. The T2 contained no details of the Respondent's case.

By letter dated the 18<sup>th</sup> July 2008, which was received by the Claimant's Solicitor on the 21<sup>st</sup> July, the Respondent's Solicitors requested that the Claimant attend a medical examination in Dublin on the 23<sup>rd</sup> July 2008. This the Claimant did.

It is clear from the evidence before the Tribunal that the Claimant has, since the 14<sup>th</sup> March 2008 sought to return to his employment following upon his period of sick leave. It is also clear that the Claimant has not been dismissed by the Respondent. Nor has the Claimant resigned his employment. Given that the Claimant sought on a number of occasions to return to work, up to the end of July 2008, and that he attended a medical examination at his employer's request on the 23<sup>rd</sup> July 2008, it seems clear that the Claimant considered himself still to be in the Respondent's employment. The T1A was lodged before the medical examination and before the final demand that the Claimant be allowed to return to work.

As stated above, the Tribunal is satisfied that the Respondent did not terminate the Claimant's contract of employment. The case was made that the behaviour of the Respondent was such as to allow the Claimant to claim constructive dismissal. Section 1(1) of the Unfair Dismissals Acts, 1977 to 2001 defines what is known as constructive dismissal. It is premised upon the termination by an employee of his contract of employment. The Tribunal is satisfied that the Claimant has not, and certainly had not before the lodgement of the T1A, terminated his contract of employment. Given that the contract of employment has not been terminated either by the Respondent or by the Claimant, the Tribunal is satisfied that this claim has been brought prematurely. The Tribunal makes no finding in relation to the substantive matter as to whether the Respondent's conduct was such that it would be reasonable for the Claimant to resign and claim constructive dismissal.

The Claim under the Unfair Dismissals Acts, 1977 to 2001 is therefore dismissed.

In respect of the claim pursuant to the Minimum Notice and Terms of Employment Acts, 1973 to 2001, the Tribunal is not satisfied that the Claimant's contract of employment was in material breach of the provisions of the Acts and that claim is therefore dismissed.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)