

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

MN391/2007
UD535/2007

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. M. Forde
Ms H. Kelleher

heard this claim at Cork on 7th January 2008
and 14th July 2008

Representation:

Claimant :

Mr. Patrick G. Goold, J. F. Goold & Co., Solicitors,
Macroom, Co. Cork

Respondent :

Ms Margaret Lucey, Timothy Lucey & Company, Solicitors, North Square,
Macroom, Co. Cork

The determination of the Tribunal was as follows:-

Respondent's case:

A Social Welfare Inspector gave evidence in relation to claims for Disability Benefit by the claimant. He was entitled to earn up to €120 per week while in receipt of this benefit. Half of monies earned over this figure would be assessed as means for Social Welfare purposes. Letter dated 1st December 2006 from the Department of Social and Family Affairs refers to the aforementioned.

The proprietor of the respondent company gave evidence that the claimant worked with him for a number of years initially as a trainee and then as a baker. He left to work for another employer and subsequently returned on 10th October 2005. The claimant had a day off for his brothers wedding on 21st December 2006 and he was due in the next day, which was the busiest working day in the industry. He did not turn up and the following day he said that he spoke to members of the staff who said they would carry on without him. On the Saturday, which was the day before Christmas Eve he came in and when asked to do a run for the local area he said he was too busy as he had to go to Cork. Witness told him he had to come back and bake and at 4pm witness discovered that the claimant had made a bread mix that had to be thrown out. On Saturday 30th December witness discovered that the bread had not been left to prove long enough and he told the claimant it was "shit" bread. The claimant responded with verbal abuse. On checking with the baker he was told the claimant was in a hurry. He rang the claimant and when he came into the shop he asked for an explanation. They went out on the street, claimant caught witness by the collar and there was physical contact between son of witness and the claimant and they fell on the ground. Witness was told by his son that he should not continue to employ the claimant. The claimant had head-butted his son. The claimant then got into a frenzy and was told to go home.

Witness later received a telephone call looking for the claimant's keys and mobile phone and his parents called to the respondent to collect his phone. His father told witness to forget the incident as the claimant had a short fuse. As witness could not afford to take chances he told the claimant he was suspending him and he never returned to work. The claimant and his brother threatened son of witness after the incident. The claimant went to the gardai stating that he had been assaulted. Initially the respondent ran two small companies and the employees were then transferred to the respondent as named in these proceedings.

In cross-examination witness stated that during the initial period of the claimant's part-time employment with the company he was aware that he was on disability allowance however since he returned on a full time basis he only became aware in December 2006, that he was in receipt of the allowance. On the day in question one hundred and sixty loaves of bread were made and they were not all bad however while there were two others working that day along with the claimant one of them came to witness and stated that the claimant was responsible for the bad bread. Witness stated that in order for this to happen the claimant had been careless. He denied that he lost his temper or hit the claimant during the confrontation.

The Tribunal also heard evidence from the son of the last witness who stated that he is working with his father in the business and had no difficulty with the claimant until the altercation in question. On 30th December 2006 he was in the coffee shop and noticed that the bread was flat and in order to sell it had to look good. His father looked for an explanation from another baker who came into the shop but he stated he did not know what had happened. He heard his father saying to the claimant what "shite" bread and an altercation developed where they followed the claimant to his car and the claimant grabbed his father by the shirt collar. Witness went between the two men and he lost his balance and fell over. The claimant tried to kick witness in the face and his father and himself caught him by the arm and put him in the car. The claimant came into the shop and witness told him he should be ashamed to have hit a fifty-nine year old man, his father, and he gave a swipe at the claimant. Witness stated that he had never been in trouble prior to this and he did not hit the claimant first. If he was looking for trouble he could have started on the street. It was not correct to say that the claimant was being punched against the car. He wanted to keep his father safe and he saw the claimant grab his father.

In cross-examination witness stated that the claimant has a short fuse. His father did not have the claimant by the throat. When asked if he would be afraid of the claimant now he said it would depend on the circumstances. There has not been any trouble between himself and the claimant since that altercation.

The Tribunal also heard evidence from DF one of the bakers who worked with the claimant on 30th December 2006. The claimant was in charge of the baking that day and the witness' job was the prover and the oven. The oven takes four racks of bread however on that day a fifth rack was made and it was not put into the prover. In relation to the complaint about the bread, all that he knew was that the bread was small.

In cross-examination witness said that the fifth rack of bread could not go into the oven. It was a rush that day and you had to get the bread baked. It was not his fault. He was told what to do and he did it.

In answer to questions from Tribunal members in relation to the fifth rack of bread witness said that it was unusable. It should have been done last and it was not put into the oven as it was there too long. Witness thought he would have been blamed but everyone was at fault. He reckoned that the claimant got the blame because he was the boss. There were no problems prior to this. This extra batch should not have been made till last but it was made at the start thinking it would prove outside the prover. It should have been in the prover forty five to fifty minutes and would then take forty five minutes to bake. It would take two hours to prove outside of the prover. The bread was needed but it was made at the wrong time.

Claimant's case:

A garda gave evidence that on 30th December 2006 the claimant and his two brothers came to the station and stated that he, the claimant had been assaulted by the respondent and his son. She viewed the marks on his face and a male garda took over from there. A statement was taken and photographs were presented to the Tribunal. On 3rd January 2007 she contacted the respondent and he said he was aware of the incident and would make a statement through his solicitor. This statement was handed in on 8th March 2007 and was witnessed by a colleague.

The claimant in his evidence told the Tribunal that he has been employed by the respondent in a number of his companies since 1993. His hours varied initially and he was in receipt of a Disability allowance from the Department of Social and Family Affairs. He has a clubfoot therefore he has a limp which, at times makes him unsteady on his feet. The respondent was aware of his being in receipt of the Disability allowance. He left the respondent to go to another bread company and subsequently returned to the respondent. He had a good relationship with the respondent. There were two other bakers working with him. He explained the procedure in bread making that the dough is placed in the prover however the prover was not strong enough to prove the loaves at the bottom therefore you have to swap the trays around. One of his colleague bakers, DF did not swap them around on the day in question. The respondent called him to the shop on 30th December 2006. The respondent and his son were there and started roaring at the claimant that the bread was "shit". DF was also there. The claimant stated that he has a short fuse and walked away, but came back and the respondent and his son followed him on to the street. The respondent caught him by the throat leading to a scuffle on the street between claimant and the respondent's son between two cars with the respondent on top of the claimant. The second time the claimant got the respondent's son on the side of the head and he followed the claimant out and hit him a slap. The claimant did not head butt him. He rang looking for his phone but did not make threats. His parents went

back to the shop to get his keys and phone.

The claimant had always got on well with the respondent and this could have been sorted out. On the day after the wedding on 21st December 2006 he came into Macroom to pick up lads to go to the factory. The lads had already gone to the factory and the respondent's son told the claimant to go on home that there were four of them there. It was not a major issue at the time.

In cross-examination witness stated that he did not refuse to go back to the bakery on 23rd December 2006. On 30th December 2006 when he was called in he was shown some of the loaves out of the one hundred and sixty. There would always be some couple of loaves battered. Witness did tell the respondent that DF was at fault. When he was told that the bread was "shit" he walked away and did not get a chance to speak. When he got free of the respondent and his son on the street he went back to the shop. The respondent's son did not say that he should be ashamed of himself for hitting a fifty nine year old man (his father). He did not head-butt the respondent's son and if he did his face would be marked and he was not wearing a stud at the time. He did not tell the respondent that his Disability allowance had been taken away or withdrawn.

In answer to questions from Tribunal members witness said that that it was the fault of DF not swapping around the shapes that the twenty-four loaves were not the right shape. Three bakers were working with each one having a definite role. If there was a problem witness was alerted and he would ring the respondent if he could not rectify the problem. Witness had no reason to be in a hurry that day. The day after the altercation he was suspended with pay and he left as he knew he was fired. The respondent told him it had "gone far enough" and that was an indication to him that he was fired. He then went to the gardai.

The claimant's mother in her evidence told the Tribunal that her son was disabled since birth as a result of her getting German measles during her pregnancy. She knows the respondent well. On 30th December 2006 she was with her son when his phone rang around 12.45 and he said he was going to the shop. She parked the car outside the shop. The claimant was not in temper. Within seconds they were up against her car at the passengers door and back door as she was getting into car. The claimant, respondent and his son were there and everything happened very fast. The respondent had her son by the throat. After this the respondent's son and the claimant were scuffling on the street between two cars and the respondent was also involved. Witness tried to get the two men away from her son. The respondent's son hit her son on the street near the car. She then got her son into her car and took him home. She and her husband came back later to collect her son's keys and phone and she understood he had been dismissed.

In cross-examination witness said that the respondent's son did not come between the respondent and her son during the altercation.

The claimant was re-called on the second day of hearing and gave evidence as to his rate of pay during his period of employment with the respondent.

An inspector of taxes gave evidence in relation to the claimant's P.35's.

Determination:

There was a lack of investigation procedures carried out in this case. The work history cannot be ignored and a single incident gave rise to the dismissal. There was the initial bad handling but there

should never have been an assault. It was totally unacceptable to bring a fight out on to the street. The Tribunal is unanimous that the dismissal was unfair and award the claimant €5,000 under the Unfair Dismissals Acts, 1977 to 2001. The claimant is also awarded the sum of €210 under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)