

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

*-claimant*

UD550/2008, MN498/2008

against

Employer

*-respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr M. Noone  
Mr A. Butler

heard this claim at Wicklow on 14th April and 18th June 2009

### **Representation:**

Claimant : Ms Mary-Jo Butler B L instructed by  
Augustus Cullen Law, Solicitors, 7 Wentworth Place, Wicklow

Ms Sara Antoniotti B L on 2<sup>nd</sup> day of the hearing

Respondent : Mr Eamonn McCoy, IBEC, Confederation House,  
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute in this case

### **Claimant's Case**

According to the claimant's signed T1-A form he commenced employment at this multinational retail store in November 2004. However, he stated in evidence that he worked there on a casual basis prior to that date. The witness started in the delicatessen and butchery sections but during the course of his employment within the store his section and shift were changed. He signed at least two documents containing his terms and conditions of employment in November 2004 and April 2006. Among its contents was a notice informing the claimant that the company's grievance procedures could be found in its handbook. Those terms and conditions carried the title of pro-rata (part-time) sales assistant.

In January 2006 the claimant suffered an injury while at work which resulted in his absence on medical grounds for several weeks. A firm of solicitors acting on his behalf wrote to the respondent on this matter. That firm called on the respondent to admit liability for their responsibility into the claimant's mishap and added that the shop was liable to compensate the claimant for that injury.

When the claimant returned to work the respondent placed him on different duties which excluded night shift work. As a consequence the claimant's remuneration was reduced and that affected not only him but also his immediate family as he was the only income earner in the household. He expressed his displeasure at the store's decision to its personal manager. The claimant nevertheless felt he had no alternative but to accept his new daytime position. Due to ongoing health issues the claimant was absent from work for medical reasons several times in 2006 and into 2007.

In early February 2007 the claimant observed an incident that resulted in the death of his close friend. That event together with other ailments kept the claimant away from work on the grounds of ill-health up to April 2007. He attended a doctor who was nominated by the respondent on 2 March. It was the doctor's opinion that the claimant was still unfit for work then and for the following four weeks. That doctor suggested to the respondent's human resource manager in a letter that he review the claimant at the expiry of those four weeks. The claimant felt he was declared fit to return to work from 1 April 2007.

The claimant referred to six letters he wrote to the respondent between April and summer 2007 seeking information on his employment status with the store. Five of those letters were dated and the undated one could have been written in August. Those letters were addressed to the following: the human resource manager, the shop's personnel manager and three bore the addressee as To whom it may Concern and one was addressed to the management of the respondent. All letters were hand written and signed by the claimant and most contained his mobile and landline telephone numbers. Those letters were either handed in at the shop's customer service desk, to the duty manager, or the night duty manager. He did not receive any receipts for those letters. The claimant's attempts to see the personnel manager proved fruitless. On one occasion he was told she was not there at the shop despite seeing her on the premises around that time.

In addition to those letters the claimant said he phoned the respondent on numerous occasions between May and December 2007. Those calls, like the letters, were related to his enquiries about his work situation. During the relevant time the claimant had two mobile numbers and a landline. He submitted copies of phone records in support of his claims that these calls were made. During this period the claimant grew increasingly frustrated at this situation and he felt used and disrespected by the respondent. On 14 January 2008 he submitted a letter to the shop containing his notice of resignation citing the respondent's lack of communication as a reason for that decision.

Evidence was heard from an employee who worked as section manager in the same branch as the claimant at the relevant time. He remembered seeing the claimant in the store once or twice when the claimant was not working but he was looking for someone else. He assumed he was looking for the store manager. He also took a telephone call from the claimant but could not remember what the call was about, and if he was asked to pass the call on to management he would have done so. Telephone records were handed in to the Tribunal. There was a mobile number if ringing in relation to an absence and the call would come through to the duty manager.

A night security employee of the respondent gave evidence that he used to see the claimant coming in to the store with a letter for the manager. Witness would tell the claimant the whereabouts of

the manager and he saw the claimant leaving without the note. The claimant also came in to get something stamped.

**Respondent's case:**

The respondent's case was that it received only one of the letters which the claimant said he sent, and did not receive the phone calls.

The Tribunal heard evidence from the human resources manager at head office. There was general agreement in relation to the undated letter and he had been asked to research telephone calls around the relevant time. Documentation was presented in evidence. He contacted the telephone company and went through the records manually. He searched for landline and mobile numbers and when he saw the prefix 5, his understanding was that this call went through to voice mail. He had no way of researching who made the calls and they were either answered or went to voice mail

The personnel manager for the store in question where the employee worked also gave evidence. She has been in this role for ten years. The claimant had been out on sick leave. His mother came in once with letters she wanted signed in relation to Social Welfare entitlements. She told his mother that he needed to go to the doctor and get sick certificates. The Social Welfare office requested a letter in order to verify his entitlements. Witness verified that the undated letter came to her and the original was shown to the Tribunal. On receipt of this letter she tried ringing the claimant and the number was not answered but a message told her the number was "not in service".

She enquired of another number for the claimant and she then rang that number. She could not remember when she received the letter but it was around the middle of the year. She also made the correction on the letter. The mobile number that could be used by employees if absent from work was introduced in July 2007 as staff were not contacting the office when they were out of work. The duty manager carried that mobile and it was not personal to any manager.

In cross-examination witness stated that she did not receive the telephone calls from the claimant or she did not receive the messages. Where issues arise such as in this case the local stores are now responsible.

Another witness also gave evidence that she did not remember taking calls from the claimant to pass on to HR. Neither did she take in letters from the claimant.

**Determination:**

The claimant said that he made numerous telephone calls, sent letters and made certain personal contacts at the store. The respondent denies receiving the telephone calls and the letters with the exception of the undated letter. The Tribunal has been given evidence of telephone calls and is satisfied on the balance of probability that he made the telephone calls and sent the letters. In his letter of resignation the claimant said he was handing in his notice, mentioning the lack of communication and gave three weeks notice. One major weakness on the part of the claimant was his failure to invoke the grievance procedures and the respondent's representative states that there was an onus on the employee to follow procedures. He was given a copy of the grievance procedures.

The Tribunal finds that the claimant was constructively dismissed, but that his failure to follow the grievance procedures contributed to the dismissal, and we have regard to this in assessing compensation.

The Tribunal awards the claimant €20,000 compensation as is “just and equitable having regard to all the circumstances” under the Unfair Dismissals Acts, 1977 to 2007. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

