

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

- *claimant*

CASE NO.

UD1242/2008

MN1155/2008

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: Ms. P. Clancy

Members: Mr. B. O'Carroll
Mr. T. Kennelly

heard this claim at Limerick on 23rd June 2009

Representation:

Claimant(s): Mr. Brian Moloney, Moloney & Associates, Solicitors, 6 O'Curry Street,
Limerick

Respondent(s): Mr. Paddy McDonnell, James Binchy & Son, Solicitors, Main Street,
Charleville, Co. Cork

The determination of the Tribunal was as follows:-

Introductory points:

At the commencement of the hearing, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was formally withdrawn by the claimant's representative on behalf of his client.

The Tribunal noted that the claimant had provided his own interpreter for the hearing of his case. When the Tribunal highlighted this, the claimant's representative explained that the claimant did not have enough English and so had brought his friend to the hearing to act as translator. He explained that the claimant had an intermediate understanding of English, and that his understanding of it was better than his speaking of it. When asked for his view on the matter, the respondent's representative stated that they would have to work with the situation and would see

how things worked as the hearing progressed. The respondent stated that the claimant had worked for him for sixteen months and that he had never had a problem with the claimant's English. When questioned by the Tribunal, the interpreter stated that he was present at this hearing for the claimant. He had worked previously with other State bodies – though not the Employment Appeals Tribunal. The Tribunal highlighted that they wanted to ensure that no one was aggrieved at the hearing but expressed a wish that the claimant give his own evidence in English and without the use of the interpreter. The claimant confirmed that he understood this.

Respondent's case:

In his sworn evidence, the respondent confirmed that he was one of the directors of the family business, which had existed for three generations and which employs twenty people.

The respondent had wanted to hire a baker and so had contacted an employment agency in Dublin. Through contacting them, the claimant had come to the place of business in Limerick and was interviewed by the respondent. The claimant was hired and employed as a baker, working from 12.00am until 8.00am. He was one of a team of three bakers.

The working relationship was okay. There had been a few incidents; when the claimant thought his wages should be more and his taking holidays when he wanted. However, the claimant was a good baker and he came to work on time.

In relation to the incident that arose, one of the three bakers, in rotation, had to come in on a Saturday for fifteen minutes to prepare the dough-mix for the following night. This was part of the duties of the bakers from the time before the claimant started his employment. One baker - a Polish national – had left so another had been employed to replace him. The respondent was aware that the claimant had a problem with having to do this job. He met the bakers two nights before the incident and left it to them to sort out the matter. They knew that it was a job that had to be done. On the night of Thursday the 22 May, the respondent returned to find out what had been sorted. He first met the claimant who refused to answer his query and told him to go and ask someone else. The claimant was uncooperative and literally would not answer the query. The respondent therefore went to the other two bakers and was told that the job would be done on a rota basis of every third Saturday. On the way out, the respondent met the claimant again. He asked the claimant why he had not answered the query and, that he had been uncooperative. At that stage, the claimant got aggressive and said, "Fire me so". The respondent felt that he was being goaded and so had left it then. Six people had been present and had witnessed the incident. When the respondent came back, the claimant challenged him again. Three to five times, the claimant said to the respondent, when are you going to fire me. The claimant was very aggressive and angry and the respondent felt that the claimant wanted him – *the respondent* – to fire him – *the claimant*. The respondent did nothing then but went home.

On reflection on the Friday morning, the respondent felt that the claimant had abused him and challenged him in front of the other staff. He felt at that stage that trust had broken down. The respondent met the claimant that morning at 8.00am after the claimant had finished work and told him he was terminating his contract of employment. He told the claimant that trust had broken down, that his behaviour had been abusive and that he – *the respondent* – could no longer work with him. The claimant left and did not work for the respondent after that time. The claimant received two weeks wages in lieu of notice and, on the following Friday, a letter dated 30 May 2008 which confirmed the dismissal. The dismissal letter stated in part "...you

verbally abused me and you displayed general disruptive behaviour on the bakery floor...". The respondent confirmed that the claimant had been dismissed because of his behaviour and this had already been told to the claimant on the Friday morning. Another baker had been secured to replace the claimant through the employment agency in Dublin.

In relation to the contention that the claimant had been unable to secure alternative employment subsequent to his dismissal, the respondent stated that the employment agency in Dublin provides employment. By way of email dated 22 June 2009 to the respondent (*a copy was opened to the Tribunal*) the director of the employment agency had said that there were plenty of vacancies for bakers and that they could have provided employment for the claimant if he had contacted them.

The respondent found the claimant's English to be reasonable. The claimant had been employed with his partner U. She had returned to her home country after a year. When the respondent had given the contracts of employment to the claimant and U, it had been the claimant who had explained its contents to U.

The respondent concluded his direct evidence by stating that he believed that he had been fair to the claimant.

In cross-examination, the respondent confirmed that the claimant commenced employment in 2007.

The respondent's business produces Polish items and had been doing so for about three years. When the claimant commenced employment, the capacity of Polish turnover was about 4000 to 5000 loaves per week. It was a product that was doing well and during the claimant's employment, the quantities produced had increased. The claimant had been a reasonably good baker and he had an input in this increase.

Sour dough-mix had to be prepared daily. The Saturday shift was for fifteen minutes in the morning and involved the preparation of this dough-mix. The respondent thought that a problem arose between the claimant and the replacement baker as to who would come in to prepare the dough-mix. This task was part of the baker's duties and they were paid extra to do it.

Two nights prior to the incident, the respondent had met the bakers. He felt that the problem was petty and involved a clash of personalities. On the second night, the respondent was informed that the problem had been resolved between the bakers. He had gone on to the factory floor and asked the claimant how the problem had been resolved. However, the claimant had point blank refused to answer, though he could have simply said that the problem had been solved. When the respondent had returned to the claimant and told him what he had learned from the others, the claimant had faced him up and told him - *the respondent* - to fire him. There were witnesses to the incident and these people were still employed by the respondent. There was no physical contact between the claimant and respondent but the claimant had been abusive by his behaviour. The respondent dismissed the claimant on the Friday morning. When dismissed, the claimant had asked why and the respondent had told him that trust had broken down. A week later, the dismissal was confirmed in writing.

The respondent confirmed that the claimant was given written terms and conditions of employment in English when his employment commenced. The claimant understood the terms and conditions of employment because he had interpreted same for his partner. (*A copy of the terms and conditions of employment were opened to the Tribunal*). Point 6 therein stated in part

“The following procedures will be followed before a decision to dismiss you from the company is taken:

- A full investigation will be carried out by the company. You may be suspended with or without pay pending such investigation.
- You will be informed of the reason for the proposed dismissal and you will have the right to state your case. You may be accompanied, if you wish, by a fellow employee of your choice or other appropriate representative.
- You may appeal to the managing Director (or other appropriate person) if a decision is taken to dismiss you at the conclusion of the above.
- If you wish to challenge the dismissal then in accordance with normal procedures, the matter shall be referred to the Rights Commissioner, the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal as appropriate.
- Certain obvious breaches on company rules, custom and practice may result in you being dismissed without notice or pay in lieu of notice.”

When put to the respondent that the incident had occurred on the Thursday night and the claimant had been dismissed on the Friday morning, the respondent replied that the decision to dismiss had been his decision and he had felt that the incident was one of gross misconduct. Both he and the claimant had been involved in the incident and he – *the respondent* – was part of it. It was further put to the respondent that the procedures of a full investigation and appeal were not followed, and that he – *the respondent* – had been judge and jury in an incident which he had been involved. The respondent replied that he was happy that the claimant received a fair hearing. The respondent had been involved in the incident but had not dismissed the claimant on the spur of the moment. The claimant had been told on the Friday that he was dismissed and this had been confirmed to him in writing on 30 May 2008.

On being referred to the fifth bullet point of the contract of employment and the phrase therein “dismissed without notice”, the respondent stated that the incident had been one of gross misconduct. It was put to the respondent that there were no guidelines in the contract as to what gross misconduct meant and the phrase “certain obvious breaches” was a very general statement. The respondent replied that he had been faced-down verbally at 12.00am by the claimant in front of all the other staff. It had not been a petty incident. The claimant had been aggressive and had wanted the respondent to fire him there and then.

Referring to the email of 22 June 2009 from the employment agency which had stated that for over the last two years up until 16 September 2008, there were several vacancies for bakers at all levels on an ongoing basis and if the claimant had made contact, they could definitely have found a place for him, the claimant’s representative highlighted that the termination of the claimant’s employment only occurred in May 2008. The respondent replied that he had just telephoned the employment agency to enquire if the claimant had contacted them seeking alternative employment and if he could have been re-employed. They had told him that there was plenty of work and the claimant could have been re-employed but he had not made contact.

Replying to the Tribunal, the respondent stated that he did not go into detail with the employment agency as to why the claimant had been dismissed.

The respondent had not brought the witnesses to the incident of 22 May with him to the hearing because he had not wanted to put them in that position. They had been his employees for a long time and in any event, he fought his own corners. He accepted that the absence of these witnesses made his case harder to prove.

There had been no physical contact during the incident on 22 May but the claimant had faced down the respondent. The incident had lasted at few minutes.

The respondent confirmed that, per the contract of employment, any appeal would really be made to him. The grievance procedures are those that are outlined in the contract of employment. The respondent accepted that there was no explanation within the contract of employment as to the meaning of “summary dismissal”.

When put to the respondent that he saw the claimant at work every Saturday, he replied that the claimant came in anyway to do shop deliveries and was paid for this job. However, the respondent was not aware that there was no rotation between the bakers and that only the claimant was preparing the dough-mix. Previously, the claimant, his partner and the Polish baker who had left had been doing the rotation. He could not know all of the details in relation to the claimant and the replacement bakers. It was put to the respondent that if he had conducted a better investigation, he could have uncovered this detail. The respondent replied that the problem had been resolved when he met the claimant and the incident had involved the claimant’s subsequent attitude.

Claimant’s case:

In his sworn evidence, the claimant confirmed that he started as a baker in Poland in 1997 and is currently working in Poland as a baker. He came to Ireland in August 2006 and gained employment in Dublin. He secured this first employment by himself.

The employment agency told the claimant about the job with the respondent and he commenced employment there in January 2007. At that time, the respondent was selling Polish breads and 600 to 800 loaves were being produced daily. The claimant helped to expand these production numbers.

The claimant explained that he came in to work on the Saturday mornings for fifteen to thirty minutes. On the Saturday afternoons, he also attended to work on the sour dough-mix and this took thirty to thirty-five minutes. He had to change into work clothes to do this job. He then returned two to three hours later to begin his shift. During the first year of employment, he had worked with a Polish friend and they had rotated the Saturday work and did it every second Saturday between them.

On 22 May – the day of the incident – the claimant had been talking to his Polish colleagues because, following the departure of his friend a month earlier, he had worked all of the Saturday on his own. He told his colleagues that the Saturday work would have to be shared as he – *the claimant* – would like to be off on some of the weekends. One of the colleagues said that he would have to discuss the matter with the respondent and had gone to another work area. He returned five to ten minutes later. The respondent then came and asked the claimant what was the problem. The claimant had replied that it was not the respondent’s problem but a problem between him – *the claimant* – and the two guys the claimant worked with who did not want to work on Saturdays. The respondent had said that it was his problem and if he – *the claimant* – did not like working like this, he knew where the door was. Three times, the claimant asked the respondent if he was being fired and the respondent had replied that he was not. The claimant maintained that he had not intimidated the respondent but he was loud and the respondent had been shouting. He agreed that both of them had been angry.

On the Friday morning after the claimant had finished his duties and delivered bread to the shop, he returned and removed his coat. The respondent was present and said that he was firing him. When asked why by the claimant, the respondent had replied that the claimant did not respect him – *the respondent*. The claimant did not say anything in reply. The respondent fired him on that Friday morning. He received the letter of dismissal a week later and the reasons for the firing were explained in it.

The claimant established his loss for the Tribunal. He returned to Dublin and sought work there, as well as in other towns in Ireland. However, he was not successful in securing another job in Ireland. In January 2009, the claimant returned to Poland where he now resides.

In cross-examination, the claimant confirmed that he and his partner had worked for the respondent. There had been three bakers working for the respondent in 2007 and during that time, the claimant agreed that the Saturday work had been done okay. When put to the claimant that the Saturday work had been done then in a rotation of three, he replied that his partner had not done the Saturday work because it was hard work for a woman. It was agreed that the claimant and the other baker, in rotation, had done the work and there had been no problems.

At Christmas 2007, the claimant's partner returned to Poland and in 2008, the other baker left so two replacement bakers were hired. Thereafter, a problem arose about the Saturday work. The claimant maintained that all of the bakers had got on together and during the first month, they had communicated well. However, the problem was that only the claimant worked on the Saturdays. Despite the respondent having said that each of the bakers would work the Saturday in turn, this was not happening. The claimant agreed that he did not raise this issue with the respondent. He had discussed the problem with the other two bakers and had hoped that they would agree to the rotation scheme. At the beginning of their employment, the respondent had done them a favour by working the Saturdays because they had lived a distance away from the bakery.

The claimant stated that he did not know that this hearing was the first time the respondent learned about the problem that had existed in relation to the Saturday work. He also stated that he did not remember the respondent asking him if the problem had been solved on the evening of 22 May. When put to the claimant that the other two bakers had told the respondent that the matter had been sorted, he replied that the bakers had only agreed to the rotation after the incident had occurred. One baker had decided to join the rotation and share the duties. The other baker agreed to the rotation two days later. The claimant maintained that the respondent saw him in the bakery every Saturday and so should have known that he was doing all of the Saturday work.

The claimant denied that he asked the respondent to fire him. After the respondent had said where the door was, the claimant had asked him – *the respondent* – three times if he – *the respondent* – was firing him. The claimant was not fired at that stage but agreed that both of them were upset. The incident happened in the presence of one worker. The other employees were in the second room. The claimant maintained that he and the respondent were not talking that loudly and machines were working so he did not think that the other employees would have heard what was going on. Subsequently, two employees had asked the claimant why he was no longer working and he told them that he had been fired. This surprised them.

When put to the claimant that he would not answer or talk to the respondent, he replied that he had not noticed that the respondent had wanted to talk to him. The respondent had not asked him if the problem had been sorted. He agreed that he had spoken loudly to the respondent and that he was upset. Following the incident, the respondent had left. The claimant had not apologised

to the respondent or spoken to him afterwards because he had not felt guilty over what had happened.

The claimant agreed that it was possible that this incident would not have arisen if he had told the respondent the problem of having to always work on the Saturdays. However, he maintained that the respondent must have been aware of the problem, and not just become aware of it at this hearing. It was put to the claimant that the respondent was only aware of a problem that existed between two of the bakers and that he had wanted it sorted.

Following the dismissal, the claimant had asked the respondent for the reason for same. The respondent had replied that the claimant did not respect him – *the respondent* – and to go home. The respondent had not said anything about the breakdown of the trust and relationship between an employer and employee. The claimant confirmed that he received two weeks pay in lieu of notice.

The claimant confirmed that he had subsequently left Limerick and had sought alternative employment. He had not contacted the employment agency first because he felt that he would be able to secure employment in Dublin on his own. He did not want to work in small towns because no Polish communities existed in such places. However, he had sent out emails seeking work in places outside of Dublin. He confirmed that he returned to Poland in January 2009 and had failed to secure work in Ireland during the intervening period. It was put to the claimant that it would have been logical to apply to the employment agency for work on his return to Dublin.

Replying to the Tribunal, the claimant confirmed that he regretted losing his job with the respondent. He had not talked to the respondent following the dismissal due to cultural differences in relation to the relationship that exists between an employer and employee. In Poland, when a person is fired, there is nothing more to discuss.

The claimant had not claimed social welfare benefit following his dismissal because he was not aware that he had been entitled to claim it.

The claimant confirmed that the other two bakers are still employed by the respondent. However, he had not called them as witnesses to this hearing because he was in conflict with one of them and knew that he would not be objective. This baker had been the one who went to the respondent about the problem and who had upset the respondent, which had caused the incident to happen.

The Saturday work had been explained to the claimant at his interview but he was unsure if the respondent had explained it to the other two bakers. It had not been a surprise to them when the claimant had told them about the Saturday work. The claimant did not know why the two bakers did not want to work on the Saturdays.

The claimant confirmed that he had received a contract of employment and within same was outlined his right to appeal against the decision to dismiss but this appeal would go to the respondent. There was no other person to whom to make an appeal and he thought that there was no other person he could have spoken to about the incident.

Closing statement:

The respondent's representative stated that in his evidence, the claimant had said that he had a

problem with another employee but this had not been told to the respondent. It was logical that if such a problem had existed, the claimant would have complained to the respondent but he did not do this.

Determination:

The Tribunal finds that there were no grounds for the summary dismissal of the claimant and the evidence adduced did not show that there had been gross misconduct on his part. Consequently, the penalty of dismissal was excessive in the circumstances. Having regard to the behaviour of the claimant during the incident, the respondent could have dealt with the matter by way of a warning. Furthermore, the respondent failed to show that fair procedures were followed in the dismissal of the claimant. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the claimant is awarded compensation in the sum of €7,000.00 under the Acts.

The Tribunal notes that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was formally withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)