

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

– *appellant*

CASE NO.

UD1197/2008

against

Employer

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. A. Taaffe

Members: Mr. A. O'Mara
Mr. P. Trehy

heard this claim in Dublin on 25-26 June 2009

Representation:

Claimant(s): Mr. David Dodd BL instructed by
Aaron McKenna, Solicitors,
Berkeley House, Ballybin Road,
Ashbourne, Co. Meath

Respondent(s): Mr. Michael MacNamee BL instructed by
DAS Group, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:-

An altercation between the claimant and another respondent employee (LB) in April 2006 arose as a result of a disagreement between them in relation to the manner in which LB was rostering the claimant's duties. This altercation resulted in a significant deterioration in their relationship at work.

This altercation and deterioration led to the claimant making a complaint to the respondent alleging that he had been physically threatened by LB. It is found that that he was so threatened.

The culmination of the respondent's investigation into these matters was a meeting in September 2006 which was called and overseen by GK (a human resources consultant employed by the respondent) at which both the claimant and LB were present and were represented by their trade union representatives.

There was a total conflict of evidence between the parties as to the outcome of this meeting. In the

absence of conclusive evidence in the form of a written record of any written documentation substantiating the outcome suggested by the respondent, it is not reasonable on the balance of probabilities to accept the respondent's contention that the investigation resulted in the claimant agreeing that his complaint had been properly investigated and addressed and that he had agreed to resume what was referred to as a working relationship with LB. It is recorded that the claimant did not appeal the outcome of this meeting.

Tensions between the claimant and LB continued until June 2007. It is not possible, in the absence of any corroborating evidence, to find that these tensions (which it is found that the claimant genuinely felt were of a bullying nature) were of such a nature because of the conflict of evidence between the parties.

Tensions between the parties dissipated significantly after an informal meeting between the claimant and LB in the summer of 2007 and no further complaints were made by the claimant until February 2008. Then a further altercation between LB and the claimant took place (arising out of the manner in which the claimant's duties were being rostered) at which it is alleged by the claimant that he was threatened and in respect of which the claimant made a complaint.

It is recorded as being agreed that the five-day paid suspension imposed by the respondent upon the claimant (for refusing to resume his work until this complaint was investigated) should not have been imposed because LB was no longer responsible for assigning roster duties and should not have engaged with the claimant. The investigation of this complaint was carried out by a Mr. O'R for the respondent and the results conveyed to the claimant with a request for him to attend a meeting to discuss this outcome on 28 February 2008.

The claimant failed to take part or engage in any meaningful way at this meeting and declined to engage with the respondent or to engage in any consultative dispute process with the respondent directly and opted to nominate solicitors to represent his interests. Finally, the claimant's resignation was given to and accepted by the respondent.

Determination:

It is found by the Tribunal majority that the claimant's decision to terminate his employment without exhausting the dispute resolution procedures that were available to him was unreasonable. It is found that the claimant did suffer medical consequences as a result of his employment with the respondent. The claimant has failed to discharge the onus placed upon him by his resignation to prove beyond reasonable doubt that the conduct of the respondent was unreasonable and was therefore of such a nature as to justify his decision to resign. Therefore, the constructive dismissal claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Dissenting Opinion of Mr. P. Trehy

An altercation between LB and the claimant took place in April 2006 regarding a disagreement between them in relation to the manner in which LB was rostering the claimant's duties.

The altercation resulted in a significant deterioration in their working relationship.

This disagreement and the deterioration led to the claimant making a complaint to the respondent that he had been physically threatened by LB.

The respondent held an investigation into these matters and called a meeting in September 2006 and was overseen by GK (a human relations consultant employed by the respondent) and attended by the claimant and LB and their trade union representatives were present.

There was total conflict of evidence between the parties as to the outcome of this meeting in the absence of conclusive evidence in the form of a written record or any documentation substantiating the outcome of this meeting as suggested by the respondent.

It is not reasonable on the balance of probabilities to accept the respondent's contention that the investigation resulted in the claimant agreeing that his complaint had been properly investigated and addressed and that he had agreed to resume what was referred to as a working relationship.

Tensions between the claimant and LB continued until June 2007. It is not possible in the absence of any corroborating evidence to find that these tensions (which I am satisfied that the claimant genuinely felt) were of a bullying nature.

Following a meeting when the claimant and LB were in attendance in June 2007 the claimant invited LB to have a coffee and tensions appeared to have eased and no further complaints were made until February 2008.

A further altercation took place between LB and the claimant arising out of the manner in which the claimant's duties were being rostered.

This led to the claimant making a complaint to An Garda Siochana regarding the most serious threat of physical violence.

On return to work and prior to commencing work, the claimant's request to see a manager regarding the threat of violence led to the claimant being suspended from work on pay.

This led the claimant to seek legal advice as he strongly felt that his complaints to management were not being dealt with in a serious or dignified way.

It is also recorded that the suspension should not have been imposed as LB was no longer in charge of rostering duties.

A witness for the claimant gave evidence that he had heard loud shouting in the canteen and also stating that he heard LB threaten the claimant saying: "I will f***ing get you!"

Other witnesses also gave evidence that LB's method of management was of a very bullying nature.

A letter to a Mr. O'R (of the respondent) on 20 March 2008 from the claimant's legal representative requesting a meeting to attempt to resolve this matter was not replied to until 8 May 2008. The respondent offered mediation through the Labour Relations Commission.

The claimant had tried to engage with the respondent through his legal representatives to resolve this problem but this was rejected by the respondent. It is also noted that there was no grievance procedure for resolving disputes within the respondent.

None of the claimant's witnesses or the claimant were aware of a bullying policy within the

respondent.

Having knowledge of previous altercations and having been given previous allegations of bullying by the claimant, the respondent should not have allowed LB to get the opportunity to get involved in the altercation in February 2008 as he was no longer involved and had been transferred to another post and had no involvement in the rostering of duties.

This allied to the totally unsatisfactory manner in which the investigation was conducted and the equally unsatisfactory loss of communications and delay by the respondent in replying to correspondence. A request by the claimant's legal adviser for direct discussions without resort to litigation was refused.

Such was the unsatisfactory way the respondent dealt with the claimant that it led to the claimant forming the view that his complaint was not being reasonably or seriously addressed by the respondent and that, therefore, his decision to withdraw from a direct consultative process with the respondent and to later resign was, in all the circumstances, (including his previous unsatisfactory experiences with the respondent) justification for his claim of constructive dismissal. Therefore, I firmly believe that this claim should have been upheld.

Determination:

It is found by the Tribunal majority that the claimant's decision to terminate his employment without exhausting the dispute resolution procedures that were available to him was unreasonable. It is found that the claimant did suffer medical consequences as a result of his employment with the respondent. The claimant has failed to discharge the onus placed upon him by his resignation to prove beyond reasonable doubt that the conduct of the respondent was unreasonable and was therefore of such a nature as to justify his decision to resign. Therefore, the constructive dismissal claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)