

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
EMPLOYEE -*Claimant*

Case No.
UD173/2009

MN171/2009
WT65/2009

against
EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. S. Ó Riordáin BL

Members: Mr. J. Hennessy

Mr. P. Trehy

heard this claim at Carlow on 13th November 2009 and 14th January 2010

Representation:

Claimant: Ms. Michelle Treacy, O'Flaherty & Brown, Solicitors,
Greenville, Athy Road, Carlow

Respondent: Mr. Duncan Inverarity, BCM Hanby Wallace, Solicitors,

The determination of the Tribunal was as follows:

The claim before the Tribunal was one of constructive dismissal.

The claim under the Organisation of Working Time Act, 1997 was withdrawn at the outset of the hearing.

It was agreed between the parties that the claimant commenced employment with the respondent on the 13th September 2006 and his employment terminated on the 5th August 2008.

Claimant's Case:

The claimant was successful in securing a position as Sales Assistant with the respondent. When completing the relevant application forms for this position the claimant outlined that he suffered with back problems. He also highlighted this at interview.

The claimant commenced employment with the respondent in September 2006 on a part-time basis. His duties included stocking shelves. The claimant's position later became full-time and he was asked to attend to the frozen food section. He was content to accept this responsibility. The claimant's duties relating to the frozen food section incorporated placing orders and maintaining stock levels. At that time another employee was responsible for the dairy section but sometime later this employee availed of a transfer to another of the respondent's premises. As a result the claimant was asked to place orders for the dairy section in addition to his own work in the frozen food section. Initially, the claimant was confident that he could manage this extra work. He was very busy placing orders, checking stock and meeting with representatives from different companies on the shop floor. The claimant was aware that he was not allowed to have his personal mobile phone on the shop floor but he had it on the shop floor so that the representatives could contact him. He also recalled one specific occasion when a member of management contacted him on the shop floor via his mobile phone. The newly appointed human resources manager addressed the issue of personal mobile phone usage with the claimant, as it was a breach of company policy. The claimant explained why he was using the phone. Prior to the human resources manager addressing him on this issue the claimant had been absent for a period of time due to back problems. The claimant attributed this to moving pallets of stock after which his back became tender and sore.

In November 2007 a manager was appointed to the dairy section. The claimant was happy about this as he was finding it difficult to perform his duties due to his back. The claimant was absent on medical certificates during Christmas 2007. He returned to work after Christmas but remained on medication. Although a manager was appointed to the dairy section the claimant continued to feel under pressure as he felt this manager did not take on a "full" role and the claimant continued the extra duty of ordering stock for the dairy section. Although the claimant showed the manager how to place orders the claimant still continued to place the orders as the manager would be called away to other matters.

The claimant spoke to the store manager about this issue and informed him that the dairy manager was not completing all of the duties associated with the role. On a number of other occasions the claimant continued to raise the issue but nothing changed. The claimant continued to attend to his duties in the frozen section and he struggled to perform these duties along with the outstanding tasks for the dairy section. The claimant outlined to the Tribunal some examples of the duties that the dairy manager was not completing. The claimant also outlined an incident when the store manager confronted him after the claimant had spoken with the human resources manager. From then the claimant was very nervous and felt he was being observed.

The human resources manager assured the claimant that she would deal with the situation. The claimant also requested lighter duties due to his back problems. The claimant was informed that he had accepted the role of sales assistant and if he did not want the job then, "there was the door." The claimant continued to feel that he was being observed.

During January and February 2008 the claimant was absent on medical certificates. On his return to work he requested flexible working hours and lighter duties due to his back problems. Both requests were refused by the human resources manager who said that he was fit to work. The claimant had returned to work for financial reasons.

The claimant submitted a letter of resignation informing the respondent that he was submitting his notice effective 6th June 2008 stating that he felt pressurised into submitting his notice because he had a disability and his request for part-time work had been refused. The human resources manager contacted the claimant and after a discussion the claimant agreed to return to work on the condition that he would be assigned lighter duties and flexible working hours. Initially, after the claimant returned to work he had flexible working hours but this changed and the claimant was put on the evening shift. These hours were the opposite of what had been agreed and it was unsuitable for the claimant as he was dealing with deliveries. This was not what the claimant had envisaged as lighter duties. He thought lighter duties would entail ordering stock and re-stocking shelves.

The claimant was in line to receive training in the role of till operator. The claimant asked the human resources manager if this training could be postponed for a period of time as he was in pain and was unable to sit for long periods. The human resources manager reiterated that he was certified as medically fit to return to work and if he was not fit to work "there was the door".

The claimant advised the human resources manager that he was having furniture delivered on the 22nd July 2008. The human resources manager informed the claimant that if he did not attend for work on the 22nd July 2008 he would receive a warning. The claimant had no choice but to be at his home on the 22nd July 2008. A number of days later the human resources manager issued him with a written warning. A meeting was also held on the 26th July 2008 to address this matter and to address the claimant's request to postpone the till operator training. At the meeting the claimant was informed he should have been present for work on the 22nd July 2008 as he had missed too many days and he was issued with a written warning. The claimant stated that the 22nd July 2008 was the first day he was absent on uncertified leave. The claimant underwent 90% of the till operator training but he asked for certain aspects of the training to be postponed until his back had improved. The claimant also outlined another time when the human resources manager had spoken to him in relation to the employee purchase scheme. The procedures for staff purchases stated that either a manager or a security employee must sign off on staff purchases. However, due to time constraints it was not always possible to have purchases signed during break times and generally employees did not get their purchases signed off. He was the only member of staff who was spoken to about staff purchases.

From the time of the meeting on the 26th July 2008 matters became worse. The final

time the claimant was brought to the office was because the dairy manager had reported that the claimant was being lazy. The claimant had been unloading a delivery of milk and his back was hurting. He sat on the edge of the fridge so that he could continue with his duties. The store manager called the claimant to the office when the dairy manager had reported this to him. The claimant could not believe that the dairy manager had made those comments after all the work the claimant had done for him. The claimant asked the dairy manager to accompany him to the office and repeat these comments to him directly. The dairy manager repeated his comments in the office. The claimant felt betrayed and victimised.

The claimant telephoned what he believed was a confidential helpline for staff but was in fact a security helpline. The claimant contacted this number as he had raised his issues with the human resources manager but his issues had not been addressed. The store manager was informed that the claimant had contacted this number and he addressed this issue with the claimant. The claimant was told that if he was not fit for work then he could leave. The claimant was stressed and felt that he was unable to continue in his employment.

The claimant submitted his resignation by letter on the 5th August 2008. The respondent failed to facilitate the needs he had because of his back. The claimant had hoped that with lighter duties and flexible part-time hours he would have been able to continue in his employment, however he was provided with heavier rather than lighter duties. The claimant gave evidence pertaining to loss.

During cross-examination the claimant accepted that the role of sales assistant entailed a broad range of duties. The claimant recalled receiving the respondent's employee handbook, which included the respondent's grievance and disciplinary procedures. The claimant tried to follow the grievance procedure as outlined.

The claimant accepted that his doctor had certified him as fit to return to work. The claimant had requested this medical certificate from his doctor, as he was anxious to return to work for financial reasons.

It was put to the claimant that he agreed to return to work in June 2008 after he had first submitted his resignation. The claimant accepted this but stated that when he returned to work the duty of ordering stock was taken from him although this was one of the duties he had wanted to retain. The claimant had outlined to the human resources manager and the store manager what he envisaged as lighter duties. It was put to the claimant that warnings were not given to him until one month after his return to work which allowed him time to raise any issues with the human resources manager or the store manager. The claimant replied that he had raised his issues with both the human resources manager and the store manager.

It was put to the claimant that he did not utilise the respondent's grievance procedures. The claimant replied that he did not have a contact number for the regional manager and he was waiting to speak with him concerning the written warnings. The claimant felt that the human resources manager and the store managers should have been capable of resolving his issues. The

claimant accepted that while he was unhappy with the response given to him by the human resources manager, he did not advance the matter any further. The claimant did not see a point in appealing the written warning to either the store manager or the human resources manager. He was waiting to speak with the regional manager at the time that he contacted the confidential telephone number for staff. When the claimant tendered his resignation he felt that he had not had the opportunity of a “full” meeting to address his issues, he felt he was being bullied into submitting his notice.

Respondent’s Case

The store manager gave evidence that he had daily contact with the claimant. In early 2008 the claimant approached him at the checkout area requesting to speak with him. The witness informed the claimant that he would speak with him in a moment, as he was busy dealing with another issue at that particular time. The claimant then complained to the human resources manager that the store manager had not addressed his issue. When this was made known to the store manager he dealt with the claimant’s issue immediately.

On the 29th July 2008 the witness was informed by the grocery regional manager that the claimant had contacted the security confidential helpline. The regional manager informed the witness that he could not understand the message left on the helpline. Accordingly the witness contacted the claimant and asked him if there was something he wished to discuss. The claimant informed him that he was not satisfied with how previous issues relating to mobile phone use, breaches of company policy relating to a failure to carry out reasonable instructions, and unauthorised absence from work were handled. The claimant informed him that he was of the view that he was talked down to like a schoolboy at previous disciplinary meetings. The witness informed the claimant that he should avail of the company’s grievance procedures if he had human resource issues. The claimant also had issues in relation to working on the checkout tills. He said he was unable to work on the tills due to a back problem. The claimant had been out sick sporadically with back difficulties but was certified as fit for work on each occasion that he returned for work. No medical evidence was ever produced by the claimant that he was unfit for certain duties due his back problems. The claimant told the witness that he understood the grievance procedures and agreed to abide by the company policies going forward. The witness understood from his discussions with the claimant that the claimant was satisfied when the meeting was over that the issues had been addressed by the company.

Finally on the 2nd August 2008 the claimant had to attend his doctor due to his back problem and, on the 5th August 2008 he handed in his notice to resign to the witness. He said he was happy to do so as he needed to sort out his back problem. The witness met the claimant some days later and understood from him that he was happy with his decision to resign.

In cross examination he could not confirm if the claimant had made the company aware of his back problems on commencement of his employment as he (the witness) did not participate in the interview process. The claimant never indicated to him that

he *was* under pressure at work. He received written warnings for failure to carry out a reasonable instruction and unauthorised absence from work. He had been spoken to previously about use of his mobile phone at work and a breach of an employee purchase policy but no disciplinary action was imposed in relation to these incidents. The claimant was given a part-time contract when he requested one. This occurred around the occasion that the claimant first resigned in June 2008. No medical evidence was ever provided by the claimant that he had a disability and the company never pressurised him in any way.

In response to questions from the Tribunal the witness confirmed that the claimant's level of absenteeism had not reached the stage where the company required him to attend the company doctor. He was certain that the claimant was satisfied with his decision to resign as he had stated that his back problems were his priority.

The human resources manager gave evidence that she provided a part-time contract to the claimant in early June 2008 after the claimant had handed in his notice to resign. She informed the claimant that it was not necessary to resign as she could provide him with a part-time contract once he provided a medical certificate stating that he was fit to resume work. He provided this certificate which was dated 18th June 2008 and resumed work on a part-time contract which provided that he work a minimum of 15 hours and a maximum of 39 hours.

The witness gave further evidence that the claimant received a written warning for failing to operate the till at the checkout. He explained that he could not operate the till due to his back problem but the company were never provided with any medical evidence that he could not carry out all his duties. He also received a written warning for unauthorised absence from work. The claimant explained that he was awaiting a furniture delivery but this was not an acceptable explanation to the company. The claimant resigned on the 5th August 2008 and did not indicate that he was unhappy to make that decision. He called to the shop after his resignation and stated to the witness that he was happy with his decision to have resigned.

In cross examination she agreed that the claimant was dealing with work related issues when using his mobile phone at work but denied that the claimant had ever suggested to her that he was over burdened with work. She accepted that the claimant had used his mobile phone previously for work purposes and had not been reprimanded for doing so by his direct line manager who was the appointed dairy manager. However this was in breach of company policy and she was strict in applying that policy when she became aware that he was using his mobile phone. She confirmed that the till training course which the claimant was requested to attend was to a refresher course. The claimant was not being moved to the tills area permanently but would be required to do so on occasions as part of his duties. She confirmed, notwithstanding her contemporaneous note to contrary effect, that, if she had been provided with medical evidence stating that the claimant was unable to work on the tills she would not have ignored it. The claimant never informed her that he wished to move to a particular department because of his back problems.

Determination:

This case involves an allegation of constructive dismissal. The onus is, therefore, on the claimant to establish, in accordance with section 1 of the Unfair Dismissals Act, 1977, that the conduct of the employer was such as would have entitled the employee, or it was or would have been reasonable for the employer, to terminate the contract of employment without giving prior notice to the employer. Regard must also be had to the well-established practice that, unless there are compelling reasons to the contrary, agreed grievance procedures should be followed.

The evidence from both sides establishes that the principal and inter related issues between the parties were work related (mobile phone incident, employee purchase policy incident, fridge incident, complaint procedure followed, till training and unauthorised absence) and health related (back problem) and how these issues were dealt with. There is no written evidence available to substantiate the claimant's contention that he referred to his back problem in an application to the respondent company predating his successful application for employment, but the back problem was an issue, which was clearly there following his employment.

The claimant's contention was that the combined affect of how the respondent company dealt with the issues was oppressive, constituted a fundamental breach of trust leaving the claimant with no faith in the company's grievance procedures and no alternative but to resign and that such resignation constituted constructive dismissal. The claimant's representative also submitted that the previous decisions of the Tribunal, in *Carmel Byrne v Furniture Link International Limited UD 70/2007, MN49/2007* and in *Liz Allen Independent Newspapers (Ireland) Limited UD 641/2000* were relevant both in relation to the substantive issue of alleged unfair dismissal and the determination of loss. The *Allen* case was referred to specifically in the loss context and consideration by the Tribunal of this would, therefore, only arise in the event that the Tribunal were to decide that the claimant was unfairly dismissed and that compensation was the appropriate redress.

The respondent contended that the manner in which they had dealt with the claimant on the work related issues had at all times been proper; that his rights had been fully respected: that he had been offered but had refused his right to be accompanied at appropriate meetings; that they had accommodated him in relation to his back problem by giving him part time work and that his employment was terminated not by dismissal, constructive or otherwise, but by the resignation of the claimant without his having exhausted grievance procedures which had specifically been brought to his attention. The respondent's representative submitted that the circumstances underlying the Tribunal decisions in the *Byrne* and *Allen* cases referred to on behalf of the claimant were completely different from what applied in this case and, to the extent that general principals were laid down in these cases, they supported the respondent rather than the claimant's position.

The Tribunal, in arriving at its determination, has very carefully considered all the interlinked issues raised by the parties. It may be, with the benefit of hindsight, that the respondent company could have adopted a more understanding attitude towards

the claimant employee who had a back problem and who had exhibited signs of stress.

There was, for instance, no reason; in a situation where he felt he was being unfairly picked on, why he could not have been told that his supervisor had also been spoken to about the use of a mobile phone in May 2008. Similarly, it should have been possible for the respondent, when the claimant returned to work in June, 2008 on a part-time basis, to have ensured that his then supervisor was made aware of his back problem in the context of the work he was then given and it would have been prudent for the HR department to have maintained personal contact with him after his return to ensure that further problems were not emerging.

The Tribunal must, of course, also have regard to the fact that the respondent company was fully within its rights in insisting on compliance with company policies and in allocating normal duties to an employee who had been certified fit for work. Certainly, on their own, the two written warnings (which were the more serious issues) were not sufficient to justify the claimant resigning and claiming that he had been constructively dismissed. In relation to the health issue, i.e. the claimant's back problem, the evidence is to the effect that the respondent, following the claimant's initial resignation in June 2008, did accommodate the claimant with part-time work which was something he was seeking for some time previously. The prime onus was on the claimant to advance medical evidence at this time if he was claiming that he could not, for medical reasons, discharge the full range of his duties or, indeed, it was open to him to go back on sick leave if that course was the appropriate medical option. However, the HR Manager's notation of the official meeting on 12 July, 2008 about the till update training, was unhelpful in that it implied that a doctor's certificate would not be a determining factor. The HR Manager in evidence to the Tribunal accepted that the company would have to have regard to medical evidence if submitted and she emphasised that he had been accommodated with part time work; he had been certified fit for work and there was no proposal to assign him to general till related work.

The Tribunal understands that the claimant was very upset at the fact that his phone call to the confidential security help line was revealed to store management but this has to be looked at in the context of the evidence given of the meeting with the Store Manager on 29 July 2008. The issues troubling the claimant were discussed and the Tribunal accepts that the Store Manager explained the grievance procedures (including the capacity to raise issues with the Regional Manager and /or a HR Representative from Head Office and ultimately on appeal to the Board), fully to the claimant on that occasion. The position here is completely different from the *Byrne* case earlier referred to in which the respondent failed to follow its own grievance procedure and failed to act reasonably

The final determining factor for the Tribunal is the form of the claimant's resignation, which was handed to the Store Manager on 5th August 2008. The resignation letter is unambiguous. It indicates that the claimant was resigning due to his back problem, and it thanks the respondent company for their attempts to address this by putting him on part-time work. There is no suggestion of other work related problems or discrimination or harassment of any kind. The Tribunal accepts the Store Manager's evidence that, unlike the initial resignation, there were no reservations or caveats expressed by the claimant at this crucial juncture and that the claimant

did intend to resign and claim disability benefit and that there was an amicable parting. Evidence of brief contact by the claimant with both the Store Manager and HR Manager in the days following support this conclusion.

In the Tribunal's view the facts as established in evidence in this case are clear and straightforward. While the respondent company could have adopted a more helpful approach at certain junctures, there is nothing in the conduct of the respondent company in respect of the work or health related issues raised in evidence which would have entitled or made it reasonable for the claimant to resign without exhausting the company grievance procedures, of which he was aware, or in claiming that he had been unfairly dismissed.

The Tribunal accepts that the claimant submitted a valid resignation on 5th August 2008 and, in the circumstances, the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)