

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO. Employee – claimant
UD1035/2008

MN959/2008
WT430/2008

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 Riordain

Members: Mr J. Hennessy

Mr D. McEvoy

heard this claim at Waterford on 13th July 2009

and 16th November 2009

and 17th November 2009

and 25th January 2010

Representation:

Claimant: Mr. Robert O' Neill B.L instructed by Mr. Brian J. Chesser,
Brian J. Chesser & Co., Solicitors, 19 Catherine Street, Waterford.

Respondent: Mr. Derry O'Carroll, Mr. Derry O'Carroll
& Co. Solicitors, 4 Ballybricken, Waterford

Respondent's opening statement:

The respondent contends that an unfair dismissal did not take place as the claimant orally gave his notice to the respondent. The respondent valued the claimant as an employee and did everything in their power to convince him to stay.

Claimant's opening statement:

The claimant contends that he requested his contract of employment on the 22nd of February 2008 and was advised by the respondent that it would be given to him on the 29th of February. On the 29th of February 2008 the claimant was summarily dismissed. The claimant was assisted by a translator in giving evidence to the Tribunal.

Respondent's Case:

The witness (B.A.) was appointed General Manager in 2004: he was originally employed as a mechanic with the company. The claimant was already employed when the GM was appointed. The claimant was a very good worker but this changed in June 2006 when his personal relationship broke down. The claimant started arriving late for work; he was very angry and was involved in arguments at the workplace; his work deteriorated and failed at times to attend work without informing the respondent of the reason. The claimant had eleven days of unauthorised absences during the final six months of his employment.

The claimant was argumentative when asked to do work by the GM and could say anything, asserting that he didn't work for the GM but for the owner of the respondent company (P.H.). The claimant would not take orders and refused to wear safety equipment (boots, vests, goggles), which were very important if angle-grinding work was being carried out. This behaviour led to his getting an official warning on 28 January 2008.

The claimant informed the owner (P.H.) two weeks after receiving the official warning that he was leaving his employment. He had first told the witness of his intention to leave. The claimant was asked to stay in his job and requested that, if he was leaving, he would stay until 22 February, 2008. The claimant agreed to stay until 22 February. The claimant accepted an invitation from P.H. to go for a drink the Friday evening he was finishing up and the witness was also present

The GM indicated in cross examination that no documents had been presented to the claimant to sign in the pub; he gave details of the claimant's pay rates, working hours and holiday arrangements; he indicated that the respondent had given the claimant money to facilitate a visit to his father in eastern Europe; he indicated that he was not directly involved with the claimant's work permit arrangements; he agreed that the claimant had no written contract but he said he was unaware of that until now: he indicated that he was aware that the claimant was concerned about a contract of employment and had been in touch with SIPTU: he had told the claimant to go to SIPTU; he said that he did not want a union in the job or an attempt to try to push union representation: he denied that the claimant had been treated unfairly and said that he had resigned his employment.

The Tribunal heard evidence from the respondent owner P.H. who had been in charge for 25 years. The respondent company was involved in plant and machinery hire and employed 68 staff.

P.H indicated the claimant had joined the company in 2002. The respondent had got a work permit for the claimant who had worked well as a mechanic/fitter for the first four years. Then in mid 2006 there was a change and problems with the claimant were brought to his attention. His work attendance was poor; he was not accepting authority and there were breaches of health and safety regulations. He spoke to the claimant who told him that he had or was in the process of separating from his partner.

There were ongoing problems with the claimant's attendance and problems with

the claimant's alcohol consumption; the claimant was continually argumentative; he refused to wear protective clothing; the situation continued to deteriorate; the claimant refused to accept authority and was given verbal warnings by his supervisor. Because of his behaviour, he was refused Saturday work and the claimant was insisting that this should resume. There were problems with the claimant most Monday mornings PH spoke to the claimant and issued a formal letter of warning to him on 28th January 2008 and sent him home that day. He hoped the claimant would sort himself out.

There was a further dispute with the claimant's supervisor on 6th February and PH got involved in it. The claimant said he was leaving there and then and he left the premises. PH wrote to the claimant that day expressing regret at his decision to terminate his employment and requesting, in view of the difficulty the respondent had in fulfilling their contractual obligations and the fact of no prior notice, that he would stay on for two weeks. The claimant duly worked his two weeks' notice. PH, the GM and the claimant had a drink the night the claimant left and there was no animosity.

The witness, in cross examination, said he had no knowledge of any attempt on the evening the claimant left to inveigle him into signing any form and that this could be confirmed by BE who was also present. He said that the claimant must have got the letter of 6th February as he had returned; he did not, however, have the claimant's address. He said that gaps in and confusion about the claimant's work permit arose because of changes, which arose in the change from sole trader to limited liability status, primarily affected the employer rather than the employee. He denied that he had caused problems in relation to the claimant's work permit. He outlined payment arrangements in relation to weekday and weekend attendances. He denied that he had terminated the claimant's employment. He agreed that the claimant was never given a contract of employment.

He said that he had been contacted by a SIPTU official (AD) by telephone in regard to the plaintiff and that he discussed the claimant's problems (including alcohol) with the official. The matter was left between the parties with a better understanding on both sides of the issues arising. He said that, notwithstanding views expressed to the Tribunal by the GM, he had no problems with unions. In response to a question from the claimant's representative as to whether the claimant might have said that he didn't want to work with the respondent and never said he would resign, the respondent indicated that the claimant had said he was leaving. He said that he had pleaded with the claimant to stay on but that the claimant was adamant, "that he was leaving on Friday", although he did agree to stay the further two weeks and he had issued the letter. He said that the payroll system operated one week in arrears and that employment terminated on 22nd February as shown in the P.45. He denied that a Mr PD had called him in 2007 regarding the claimant. He said that he was attempting to get agreement with individual staff in relation to contracts but this was not possible in all cases. He thought that, if he had offered a contract to the claimant he would have been reluctant to sign. In response to a query as to how the claimant got the warning on 28th February he said that he had discussed the issues (refusal to carry out duties; breach of health and safety instructions: arguments with management and absenteeism) with the claimant and he had handed it to the claimant, who had acknowledged it formally. He

said that the letter of 6th February was put in with the claimant's payslip following his decision to leave employment and he denied that it was a concoction. He said that the claimant had no difficulties understanding English and that the claimant had assisted in translations on occasion.

The Yard Manager (DB) gave evidence. He said that he was responsible for the claimant's work in the yard. They were good friends but problems arose in 2006 following a breakdown of the claimant's relationship with his girlfriend. The claimant's work attendance and performance deteriorated and the claimant had been abusive to him. He had refused to carry out duties and there were health and safety issues. There were problems with absenteeism and the matter got progressively worse with him regularly (2/3/4 times per week) being aggressive and seeking to go to the GM or the owner (PH) leading to the warning on 28th January. He said that he was a witness to the claimant telling PH on or around 6th February that he was finishing up. The claimant had also told him in the yard that he was finishing up and he had told the claimant that he should be careful, as jobs were not easily available and that he should not "shout off his mouth" like that. He agreed that the claimant did shout off his mouth occasionally and he indicated that the claimant had no language problem. He had socialised with the claimant and he had perfect English. He said that the claimant regularly had an alcohol problem and that it was ongoing. He had seen conversations not arguments between the claimant and PH and on occasions he had been sent home drunk. He said that so far as he was aware he had not been present in the pub the night the claimant left and he had not told the claimant that he should sign a contract. It was possible that he had driven the claimant home that night. He was not aware of work permit issue but he did know that the claimant had gone to a union but was not aware of the reason. He said that the claimant had only indicated on one occasion that he was finishing up – that was to himself and to PH as earlier indicated.

Claimant's Case:

A SIPTU official subpoenaed by the claimant (AD) gave evidence. He said that the claimant had contacted him in mid to late January 2008. The claimant was agitated about the way he was treated at work and referred in particular to late working on Saturdays, hourly rates and overtime and work permit issues. He had no contract nor any discipline or grievance procedures. He had a lengthy chat with PH, which addressed the issues raised but also branched off to discuss other employment related issues. A disciplinary letter was not discussed and he was not aware of this issue. PH told him that he was not aware of concerns about how the claimant was treated and he told him that there had been problems in relation to the claimant's attitude and drinking. PH undertook at the end of the discussion to go back informally and talk to people and to revert to him. He rang PH some days later who told him that he was very busy and undertook to come back to him. The witness subsequently moved to a new work location and had no further involvement in the case.

AD confirmed in cross-examination that his contact with the claimant was mid to late January and not in February 2008 and that the issues involved were those already stated. His contact with PH was informal.

The claimant gave evidence to the Tribunal. He had been working with the

respondent since 2002 and he denied that his work had gone downhill since mid 2006 or that he had come in drunk to work or had ignored health and safety requirements. There were, he said, normal work related exchanges from time to time but he was not argumentative.

He had difficulties getting a work permit for 2007 and raised it with PH who told him that they would discuss it. A valid work permit was essential. There was no progress despite his raising it with PH. PH shouted at him regularly and told him to get on with his job. He spoke to PD who had experience of immigration matters and he contacted the Migrant Rights Centre in Dublin. The Centre wrote to PH on 28th September, 2007 outlining his concerns about the delay in getting the 6th renewal of his work permit which would have entitled him to work with the same employer for an unlimited period without the need for an annual renewal of permit. He was working under stress and PH gave no explanation to him as to why it took until November 2007 for the permit to issue.

Subsequent to his return to Ireland in January 2008 he got the flu and was told by PH to stay at home. He got a medical cert to 18 January and some days after PH had a discussion with him and raised difficulties about payment of wages and Saturday work. The claimant said that there had been difficulties for some time in getting paid on Friday night rather than his pay being held over until he did Saturday work. He had no written contract. He subsequently contacted AD at SIPTU and raised his problems with him. He did not have any official warning when he met AD.

He said he got a warning letter with his wage slip and that he spoke to PH. He indicated that he never said that he was leaving in any discussions or arguments with PH and that he was not aware of any grievance procedure. There were always arguments with PH who regularly screamed at him. He specifically denied telling PH on 6th February that he was leaving and he said that he never received PH's letter of 6th February. He was unaware of the letter until he came to the Tribunal. He confirmed receipt of the written warning but denied that the alleged signature/initials of acknowledgement were his. (Other documents with his signature were shown to the Tribunal). At the public house on 22nd February he was given a contract written by PH which included a requirement that he would not take drugs or drink; that he couldn't open his mouth; "can't do nothing"; He did not sign the document which was not a work contract. He said that, in addition to PH, BE and DB were also present.

He said that on Saturday 23rd February, he contacted BA who told him to go to SIPTU and to get a contract and that they would check the contract which he brings. When he contacted SIPTU they told him that the contract should be supplied by the employer. He contacted PH on 25th February who told him to come back to work on Thursday/Friday and he should "sign contract and then come back". When he returned to work on Friday his P.45 was in his envelope and he found himself dismissed without warning or without notice. The P.45 showed his last work day was 22nd February 2008.

Details of loss were given. References were also made to holidays taken over Christmas 2007.

In cross examination the claimant said that PH was very argumentative, always screaming and abusing him. He denied telling DB to “f. off” and said that it was the Irish people working there who used the bad language. He did his job and he said that he always used protective goggles and gloves. He denied that he refused to carry out his duties or that he was always arguing. He at times needed advice on electrical matters. He agreed that PH spoke to him and he said that PH never explained, just shouted and he denied receiving oral warnings. He said he contacted AD after receiving the warning of 28 January. He confirmed that he never saw the letter of 6th February. He said that PH and BE asked him to go for a drink on Friday 22nd February and that it was usual for him to have drinks with them every three weeks or so, always on a Friday night. He denied that the only reason he returned to work finally was to collect his cheque: he said it was to sign a contract and he denied he ever told PH that he was giving up his job. In further cross examination by the Tribunal he said that the warning of 28th January was with his payslip on Saturday 26th January; that he did not understand what it was about and in his subsequent enquiring from and talking to PH, he was told to look up a dictionary. He said that there was no occasion on which he had ever told PH that he was leaving and that the first he knew of the letter of 6th February was seeing it at the Tribunal. He said that the first time he knew he was dismissed when he saw the P.45 enclosed with his payslip on 29th January and PH said good luck to him. He was shocked and he was not aware of any grievance procedures.

Evidence was given to the Tribunal by PD. He said that he knew the claimant for over years and it arose because of his experience in helping non nationals, mostly eastern Europeans, with passport and visa related problems. He said that, at this stage, he knew over 500 non nationals and that he often was in touch with Gardaí and other authorities on behalf of individuals. He explained that when work permits run out there will not be a renewal if passports or visas are out of date. He had been advising the claimant who was very anxious in 2007 about getting his 6th work permit and potentially being entitled at that stage to a continuing permit, without the need for annual renewal, and he had put him in touch with the migrant rights organisation. Information which PH had given the claimant that he had applied for a work permit was incorrect (the witness had checked on behalf of the claimant) and on one occasion, PH told him on the phone not to interfere in his business and was threatening to him. PH would not hear any of his concerns about the affect of the delay on the claimant. He had also been on the respondent’s premises on occasion and PH had, he said, made derogatory remarks to him about non nationals.

The witness indicated that he had a blinds business in Tramore and that he had helped the claimant when he was out of work by employing him for 6 weeks in 2008. He had sought a permit for the claimant but had to let him go when this was refused. The claimant’s position was that his work permit and visa had expired and he was not entitled to be in the country. PD indicated that he had made an official application for leave to stay for four months, but if the claimant was successful, he would still have to get a work permit, which, in the current economic climate, was highly unlikely. PD said that it was not believable that the claimant had voluntarily left his job given the fact that he wanted to remain in the country with his son and that he would be putting his work permit and permission to remain here at risk.

In cross examination PD gave details of his employment of the claimant in March/April 2008 and gave the Tribunal a copy of the relevant P. 60. In relation to his personal experience, he indicated that he made visa applications for 12 of his own employees. He also said that, from his own work experience, he could not see how it could be asserted that the claimant had regularly omitted wearing his goggles while welding; he said that doing this once would result in flash burns and there would no need for an employer to remind him. He agreed that he had not been present when the claimant's employment ended and that he had no personal knowledge of the claimant's work practices while employed by the respondent.

Determination:

The core issues in this case are whether the claimant resigned or was dismissed and, if he was dismissed, whether this dismissal was or was not unfair having regard to the provisions of the Unfair Dismissals Acts, 1997 to 2007. The difficulty faced by the Tribunal in trying to arrive at a determination is that the case is characterised by fundamental conflicts of evidence between the claimant and the witnesses on behalf of the respondent company. These conflicts are not confined to the core issue but stretch across the entire work and behavioural record of the claimant and extend into the post work social domain.

The Tribunal must decide between two diametrically opposed alternatives. The claimant says that he did not tell the respondent that he was resigning or leaving his job and that he was dismissed on 29th February 2008 when he received his P.45, which indicated that his last day of employment was 22nd February 2008. The respondent says that the claimant resigned. The owner of the respondent company says that the claimant was having a dispute with his supervisor on 6th February, 2008 and that, when he got involved in discussion on the ongoing situation, the claimant, without giving any reasons, told him that he was leaving there and then but that he agreed to stay on until 22nd February. This followed a request in a letter dated 6th February, which was with his payslip.

The Tribunal, after very careful consideration of all the evidence tendered by both sides prefers the evidence tendered by the claimant in relation to the core issue of resignation versus dismissal. The Tribunal, on the basis of the evidence before it, does not consider that a valid resignation was submitted by the claimant on 6th February and accepts that he was dismissed by the respondent on 29th February 2008.

The Tribunal sets out the principal reasons for its determination in the following paragraphs.

The Tribunal attaches great weight to the fact that the submission of a resignation by the claimant would have been fundamentally against his interest in remaining in the country and getting a long term work permit and to the evidence and submissions that such a course, which he absolutely denies, would have been inconceivable for him. The Tribunal was also struck by the substantial difference between the wholly negative picture of the claimant presented in oral evidence by the respondent and the lack of earlier action to address this situation and the lack of specificity in relation to some important aspects. The picture painted in oral evidence by the respondents was of a worker who regularly appeared under the influence of alcohol at work; who refused to carry out his duties; was always arguing with supervisors and management, refused to follow health and safety requirements and was regularly absent without

consent. The Tribunal considered that such a negative portrayal of the claimant, if correct, would have elicited formal disciplinary action by an employer much earlier than the first written warning given the claimant in the notice dated 28th January 2008.

The portrayal in oral evidence is also completely at variance with that expressed in the respondent's letter of 6th February 2008 in which the respondent indicated that it was with deep regret they received notification that as a valued employee he had decided to terminate his employment.

The Tribunal was also concerned that, despite the general allegation of serious and continuing misconduct by the claimant, no specific dates apart from the absences of alleged misconduct were identified in evidence to the Tribunal. Even the first official warning does not support the picture given in oral evidence of an employee seriously out of control in that it makes no reference to his turning up at work under the influence of alcohol and it is somewhat conditional in form (if the following occurs). In relation to the repeated evidence from the respondent that the claimant regularly refused to wear goggles, the Tribunal is disposed to accept the point made by PD and the claimant that such a practice was highly unlikely given the flash burns that it would cause.

The respondent claims that they tried to persuade the claimant to remain in employment and that they accepted his resignation with deep regret. The Tribunal considers that this must be set against a situation in which the claimant had raised serious issues about delays in his work permit and was raising problems about his contract, about working hours, about Saturday work about payments on a Friday and had contacted SIPTU in relation to the way he alleged he had been treated and that the GM was opposed to union involvement. Taken together with the evidence of wholly negative work and behavioural practices, it is difficult for the Tribunal to understand, notwithstanding their evidence to the contrary, why the respondent would have wished to continue the employment of an employee who appeared on the evidence to be somewhat of a thorn in their side.

The Tribunal is not in a position to resolve the conflicts of evidence which arise in relation to the events in the public house after work on 22nd February but it accepts that the respondent was aware that the claimant was to consult SIPTU, partly on the initiative of the respondent, in relation to a written contract and that he was returning to work thereafter.

The Tribunal considers that there is sufficient evidence to support the proposition of some ongoing disagreements, perhaps heated, between PH and the claimant and that, there may have been some such exchange between the parties around 6th February, 2008. In a situation where any employee might "resign" during a heated situation, there is an issue as to the validity of such a resignation and this is even more relevant if there are some language and translation issues. Given the importance of the issue it is regrettable that there is no certainty in relation to the claimant being given the letter at 6th February. Again, in relation to any "resignation" purportedly submitted by an employee in an argument or in an off the cuff manner it would be wise to seek formal written confirmation. This, in the Tribunal's view, is even more so in the case of a valued employee who might give no reasons for leaving (it is accepted that he never said he was resigning) and whose resignation is likely to be accepted only with deep regret.

The Tribunal determines that the claimant was dismissed by the respondent when he returned to work on 29th February 2008 and received his P. 45. There were no dismissal or grievance procedures in operation in the respondent company, which would have enabled him to address the issue of the termination of his employment; Indeed the absence of a written contract of employment and the absence of grievance and discipline procedures may well be the root cause of the problems in this case.

The Tribunal in all the circumstances determines that that the dismissal was unfair and allows the claimant's appeal under the Unfair Dismissals Acts, 1997 to 2007 and determines that compensation is the appropriate remedy. Apart from some weeks' work with PD, the claimant has been unemployed for nearly two years and claims that his prospects of future employment are not great. The claimant is, however, highly qualified and there may have been in those circumstances opportunity to better mitigate his loss. The Tribunal, taking into account the matters referred to in section 7 (2) of the Unfair Dismissals Act, 1977, determines that compensation in the sum of €30,000 should be paid.

The Tribunal determines that a sum of €2,800, being four week's notice, should be paid under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal is not making any award under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)