

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE – *claimant*

against

EMPLOYER - *respondent*

under

CASE NO.

UD405/2009

RP404/2009

MN409/2009

WT178/2009

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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. M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Letterkenny on 12th October 2009 and 8th December 2009

Representation:

Claimant: Ms. Margaret McGinley, McGinley & Co., Solicitors, Main Street, Milford, Co. Donegal

Respondent: Mr. Jamie Tevlin, IBEC, 3rd Floor, Pier 1, Quay Street, Donegal Town

The determination of the Tribunal was as follows:-

Dismissal was in dispute

Opening statement:

The respondent's representative stated that the claimant was not dismissed from the respondent's employment either constructively or at all. Instead, the claimant resigned his employment on 30 October 2008 through correspondence from his legal representative.

Constructive dismissal describes a scenario where an employee resigns from employment as a result of an employers conduct. Same can be considered under "entitlement" and "reasonableness".

An employee is entitled to terminate his contract of employment where an employer is guilty of conduct which is a significant breach of contract and which demonstrates that they no longer intend to be bound by one or more of the essential terms of the employment contract. When such an entitlement does not exist, an employee may still be entitled to claim constructive dismissal where an employer acts unreasonably, but the burden of proof lies with an employee to show that the employer's conduct was unreasonable. The employee's conduct must also be examined. It had been established by the Tribunal that the failure of an employee to exhaust internal grievance procedures could be fatal in a claim of constructive dismissal. In the case Ud720/2006, the

Tribunal found that “the claimant did not exhaust the grievance procedures made available to him by the respondent... In a constructive dismissal case it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair.”

In this case, it was the respondent’s position that they made no breach of the claimant’s contract of employment by their actions. Furthermore, the claimant left his employment before exhausting the respondent’s grievance procedures, despite being urged to continue in his employment and engage in a mediated solution by the respondent’s proprietor. As the claimant will not discharge the burden of proof justifying a claim of constructive dismissal, the claim under the Unfair Dismissals Acts should be dismissed.

As no redundancy situation existed within the respondent company, the claim under the Redundancy Payments Acts must fail. So also the claim under the Minimum Notice and Terms of Employment Acts as it was the claimant who resigned from his own employment without notice.

The claimant indicated on his T1-A form (*Notice of Appeal*) that he was due fourteen days annual leave under the Organisation of Working Time Act. It was the respondent’s position that, from their records, the claimant had taken fifteen days annual leave for the year 2008. The respondent undertook to make good any shortfall in annual leave that was owed to the claimant.

Claimant’s case:

In his sworn evidence, the claimant confirmed that his employment with the respondent – a nursing home – commenced on 2 December 2005. He was employed as a maintenance person. His role also included showing the relatives of patients around the premises and discussing fees with them. He was employed to work five days per week from 9.30am until 5.00pm, but could work seven days. If problems arose at night, the claimant would receive a telephone call at 3.00am or 4.00am about same. He resided beside the respondent’s premises. By October 2007, the claimant’s position advanced to that of general manager.

Up to the time of the incident on 1 October 2008, the claimant had a good working relationship with the respondent, staff, patients and relatives.

On 9 September 2008, the son-in-law (*hereafter referred to as Dass*) of the respondent’s owner held a meeting with staff. He told them the position that the respondent was in and that he wanted work done better. At that time, Dass had only been working in the premises for a month and had assumed the role of manager.

At a meeting in Dass’s office, the claimant was asked to take a reduction in wages. When the claimant refused this, he was then asked to take a reduction in the hours that he worked. The claimant was not agreeable to this either. The claimant was also asked for the keys to the premises. He handed over all keys plus the master key, which opened all doors in the premises, except the door to his store. The store had been fitted with a different lock and the claimant did not hand over the key to the lock for this store. The claimant kept tools, drills, gardening equipment, Christmas decorations, alter wine, etc., and money from the book club and lotto syndicate in the store. The money amounted to approximately €300 in cash.

On 1 October at 5.00pm as the claimant was leaving the building, Dass approached him and said the he wanted to get in to the store. The claimant enquired as to why and was told by Dass that he

wanted to leave files back into the store. He told Dass that he had no problem with opening the store to put the files back but Dass demanded the key to open the store without the attendance of the claimant. The claimant explained to Dass that he – *the claimant* – had personal belongings and money in the store. Dass asked the claimant if he – *the claimant* – did not trust him and the claimant had replied that it was not a question of trust, and explained that he had no problem with opening the store for him at any time. As Dass was not prepared to go with the claimant to the store, the claimant left without opening the store. However, as he was leaving, the impression he got from Dass was that he – Dass – was going to get into the store.

While at home that evening, the claimant received a telephone call from Mr. McC – described as a financial advisor/accountant to the respondent. Mr. McC told the claimant that there was a problem and asked him to return to open the store. The claimant was agreeable to this and told Mr. McC that he had already offered to do this. He was not able to return to the premises at that time, as he had to be elsewhere. On his return at 9.30pm, he went to the premises. There he met Dass coming out of the premises. Dass told him that he – *the claimant* – was too late and that access had already been gained to the store. Dass also said to the claimant that he was barring the claimant from entering the building. When the claimant asked what would happen if he did enter the building, Dass told him that he would contact the Guards. The claimant interpreted this barring to mean that if he could not enter the building, then he could not work. He felt the barring was bad on his character and that he must have done something bad to get banned from the building. Dass was very angry with him and he did not try to reason with Dass as he felt that there was no point. At that point, the claimant left the building.

Several days later, the respondent's owner (*hereinafter referred to as PPres*) called to the claimant's home and asked the claimant to return to work. When the claimant asked about the position between himself and Dass, PPres told him that he – PPres – just wanted the claimant back, to come back and to ignore Dass. However, the claimant felt that it was impossible to return. Dass had told the claimant that he owned 50% of the respondent and the claimant felt that he could not return and have a working relationship with someone who had a 50% ownership, despite being told by PPres to forget about this.

The claimant received letter dated 2 October 2008 and signed by Dass, by hand, wherein he was invited to a meeting on 7 October at 1.00pm with Dass and PPres in the respondent's premises. The letter also formally requested the return of claimant's keys so that access to all areas of the building could be gained. However, the claimant maintained that by that stage, he had given all keys including the master key to Dass, and had not withheld any of the keys from him.

The claimant confirmed that he would attend the meeting on 7 October with his legal representative. On ringing the doorbell, the door was answered by the lady in the office (*hereinafter referred to as Dn*). She invited the claimant into the premises but he felt that he could not enter as he had been barred. He felt that Dass would have to come to the door and invite him in to the building, and he explained this to Dn. She laughed at this, could not believe it and said that she knew nothing about it. Dass then came to the door and asked the claimant to come in to the premises. Dass was not pleasant and his demeanour was aggressive. He told the claimant that he – *the claimant* – could come in to the premises only for the purpose of the meeting.

The meeting was attended by the claimant, his legal representative, Dass, Dean and the son of the owner (*hereinafter referred to as JPres*). At the meeting, the claimant told Dass that he – Dass – had all the keys to the premises. Dass requested the key to the store that the claimant had refused to hand over and the claimant gave him the bunch of keys that he – *the claimant* – had. The key to the

store was on this bunch of keys. At this meeting, Dass said that Mr. McC had told him that the claimant had said that he was refusing to hand over the store key. Mr. McC was not at the meeting and the claimant wanted him to be present so as to dispute this allegation. Several times, Dass said that he was going to adjourn the meeting. At the conclusion of the meeting, Dass walked the claimant to the door. The claimant was still barred from the premises and could not see the issue being resolved. PPres called to the claimant's home after the meeting but the claimant was not there at the time. After this, he had no further contact with PPres.

Following the meeting, the claimant's position was that he had been dismissed. He could not see himself going back to work there. The claimant had lived close to the respondent's premises. He was distressed and hurt because it looked bad when people learnt that he had been barred from the premises. He had never had a problem with anyone in relation to keys before this time. Before Dass, the claimant had dealt with the Matron and PPres and there had been no difficulties. Furthermore, before this incident with Dass, there had been no difficulties between them. The problems started when Dass had asked the claimant to reduce his wages and hours and the claimant had not been agreeable to same.

The claimant never received an oral or written warning of any type, or the respondent's grievance procedures during his employment. He was aware of the process involved in the grievance procedures from his dealings with other employees of the respondents, when they had received same. He received a copy of grievance procedures from the respondent in their letter to him of 11 November 2008.

From the meeting on 7 October to the respondent's letter of 11 November, there was no further follow-up from the respondent to resolve the issue. After the letter of 11 November, the claimant felt that he had no other option but to refer a claim of unfair dismissals to the Employment Appeals Tribunal. He did not feel that the respondent could take any disciplinary action against him, as he had done nothing wrong. The only issue had been about the key to the store and he had not refused to hand it over.

The claimant established his loss for the Tribunal. The last payment he received from the respondent was on 19 October 2008. Despite applying for work locally, he had not been successful in securing alternative employment since his employment with the respondent ended.

In relation to the claim under the Redundancy Payments Acts, the claimant was unsure if the respondent had replaced him at work. Furthermore, as he understood it, when he left his employment, he was due fourteen days annual leave under the Organisation of Working Time Act.

During cross-examination the claimant agreed that he was aware of the grievance procedure that formed part of his terms and conditions of employment and that he had signed a copy of this. The claimant also agreed that he had not lodged a grievance either formally or informally and that the employer had attempted to meet with him. Since termination of employment with the respondent the claimant has been working one day per week in a night club at a rate of €80 per day.

The legal representative of the claimant (hereinafter called MM) gave evidence. MM attended the meeting of 7th Oct. 2008 at the request of the claimant. The claimant was invited into the office by Dass who said that the ban on the claimant entering the premises was lifted for the duration of the meeting.

During the meeting Dass stated that the claimant had refused to hand over the keys and that

Mr. McC could confirm this. However when MM asked if Mr. McC was to be present Dass gave her an aggressive look and said Mr. McC would not be there and ended the meeting. There was no indication of a further meeting. At the end of the meeting Dass said that the claimant was suspended on full pay pending an investigation.

Respondent's case:

Dass gave evidence on behalf of the respondent. He said that there had been an inspection by HSE inspectors in September and that they had requested the file on a previous Matron for 2nd October. Having searched every other room in the premises Dass asked the claimant for the key to his store room. This request was at 5pm when the claimant was going home. The claimant refused to give Dass the key and went home. Dass rang the owner who was on holidays in Spain and was told to ask Mr. McC to contact the claimant as he was a friend of his. Having waited until 9 or 9:30pm Dass forced entry into the store room and found that the requested file was not there either. At 10pm as Dass was leaving he encountered the claimant in the car park. He told the claimant he was too late and that he had already gained access to the store room. The claimant was annoyed about this and told Dass he had no right to do this. The claimant wanted to go into the premises but Dass did not want this as he preferred to discuss the matter on the next morning. When asked by the claimant what would he do if the claimant entered the premises Dass said the Gardai would be called.

Dass said that at the meeting of 7th Oct. he had been asked if Mr. McC would be present and had replied no. The meeting was adjourned and this seemed to be OK with the claimant's representative. As far as he was aware no investigation into the incident of 1st Oct. took place. He took the letter of 30th Oct. from the claimant's solicitor to mean that the claimant had resigned and therefore the claimant was removed from the pay roll.

Determination:

The Tribunal carefully considered the evidence adduced and the submissions made.

Dismissal was in dispute in this case and it fell to the claimant to prove his case on the balance of probabilities, that the respondent had acted in fundamental breach of contract entitling the claimant to resign or that the respondent's conduct was such that it was reasonable for him to resign.

In this case the claimant was aggrieved by the behaviour of Dass, whose behaviour and conduct towards the claimant was unsatisfactory and did not follow good practise. The claimant was aware of the respondent's grievance policy and procedure but consciously decided not to invoke it. While it was clear that the claimant was hurt and upset by the words and actions of Dass, the claimant should have followed the internal grievance procedure that was available to him and having failed to do so it was not reasonable for the claimant to resign. The Tribunal therefore dismisses the claim under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal finds that there is no case under the Redundancy Payments Acts, 1967 to 2007.

The Tribunal is satisfied that the claimant resigned without giving notice and therefore the claim under the Minimum Notice And Terms Of Employment Acts, 1973 to 2005 fails.

The Tribunal is satisfied that the claimant was paid any holidays due to him under the Organisation of Working Time Act, 1997 and therefore the claim under these acts fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)