

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **Claimant**

UD2327/2009

MN2163/2009

WT987/2009

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. C. Corcoran B.L.

Members: Mr. M. Noone
Mr. N. Dowling

heard these claims at Dublin on 15 November 2010
and 4 April 2011

Representation:

Claimants:

Mr. Barry Quirke B.L. instructed by, on the first day,
Ms. Elizabeth Howard and on the second day,
Mr. Brian O'Sullivan, both of Howard Synnott Solicitors,
Ballyowen Castle, Ballyowen Shopping Centre, Lucan, Co. Dublin

Respondent:

Mr. Barry O'Donoghue, Ferrys Solicitors,
Inn Chambers, 15 Upper Ormond Quay,
Dublin 7

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make his case.

The claimant was employed in the public house as a part-time barman from March 2008 at which time it was operated by a limited company. The respondent took over the operation of the business in October 2008 following a transfer of the undertaking.

The claimant's position is that whereas before the transfer, from the summer of 2008 he had been

working 35 hours a week following the transfer and his hours were significantly reduced. This was in circumstances where the respondent brought in his daughter and another barman who had worked in the establishment operated by the respondent before he came to this business.

The claimant approached NERA about his dissatisfaction with the way he was being treated following the transfer some time around February 2009. As the claimant's hours were increased he took no further action until the summer when his hours were reduced and then lodged a complaint with the Rights Commissioner service under the Industrial Relations Acts. On or around 31 July 2009 the Rights Commissioner service wrote to both the claimant and the respondent.

On Sunday 9 August 2009 the claimant was called to a meeting at 1-30pm before his shift was due to begin with the respondent and his business partner (BP). The purpose of this meeting was to discuss the claimant's complaint to the Rights Commissioner service. The claimant's position is that the respondent accused him of looking for money and to cause trouble and wanted him to withdraw the complaint. The claimant's position is that he felt he was being pressured into withdrawing his complaint. The respondent told him he knew where the door was and could leave at any time. The claimant wanted someone to represent him and the respondent told him that was not necessary. The claimant's position is that he was then suspended without pay and as he was leaving the premises the respondent told him not to speak to the other staff when on the premises.

The claimant went to his local Citizens Information centre and was assisted in writing a letter to the respondent on 10 August 2009 in which he sought to be reinstated immediately. An information officer (IO) from the CIC spoke to the respondent by telephone on both 10 and 14 August 2009. This letter sought, inter alia, the position with regards to the claimant's employment. IO again wrote to the respondent on 24 August 2009 and again referred to the claimant being suspended without pay and once again sought the position with regard to the claimant's employment.

The respondent would not deal with IO, his position being that he had been dissatisfied with the way she had dealt with other matters in the past. On 28 August 2009 the respondent wrote to the claimant in the following terms "Please make arrangement to come and meet with me with your legal representative (not Citizen Advice). Please contact me as soon as possible."

IO again wrote to the respondent on 4 September 2009 and asked if the claimant had been dismissed in which case she needed to know the grounds for any dismissal. IO further advised the respondent of a proposed Payment of Wages Act claim the claimant was proposing to lodge with the Rights Commissioner service.

Recognising that the claimant was not in a position to employ a solicitor the respondent suggested that the claimant's mother accompany him at a meeting with the respondent. A meeting proposed for 14 September 2009 had to be cancelled due to the respondent being unwell. When a second meeting arranged for 16 September was cancelled for the same reason the claimant's mother became involved in an argument with BP during a phone call about the time for a meeting. As a result of this incident the respondent was no longer prepared for the claimant to be represented by his mother.

No further meetings ensued, the claimant spoke by phone with BP on 30 September 2009 and his position is that during that conversation he was given the option of attending a meeting with a legal representative or he could resign. The claimant submitted his resignation by letter to BP the same day.

Determination:

Save for adducing evidence of loss in the event of this claim succeeding the matter of the number of hours worked by and the pay received by the claimant in this case are irrelevant to the consideration of this constructive dismissal claim. The claimant had a dispute with the respondent about his work and sought to vindicate his rights through the Rights Commissioner service. When the respondent became aware of this action on the part of the claimant the respondent called the claimant to a meeting on 9 August 2009. At the conclusion of that meeting the claimant felt that he had been suspended without pay. The respondent's position is that the claimant was never suspended. He never worked for the respondent after that meeting. On the following day the claimant wrote to the respondent requesting that he be reinstated immediately. There was no response to this request; it was never addressed in all the subsequent correspondence. If the respondent was correct in his repeated assertion to the Tribunal that the claimant was never suspended then the question must be asked why did the respondent not write to the claimant to dispel any notion that he was suspended. The Tribunal is satisfied that, at the meeting on 9 August 2009, the claimant was suspended without pay by being deprived of any further shifts. It is well established that suspension without pay is a disciplinary sanction. No evidence was adduced to the Tribunal of any investigation having taken place into any actions or conduct of the claimant so as to justify the imposition of such disciplinary sanction. Section 6(2)(c) of the Unfair Dismissals Acts, 1977 to 2007 provides:

Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following (c) civil proceedings whether actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness.

The Tribunal is satisfied that the suspension of the claimant was related to his having lodged a complaint with the Rights Commissioner service. The Tribunal is further satisfied that the suspension without pay of the claimant for some seven weeks represents a fundamental breach which goes to the root of the contract of employment such as to justify the within claim of constructive dismissal. Having considered all the circumstances the Tribunal awards €17,000-00 under the Unfair Dismissals Acts, 1977 to 2007.

This being a claim of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise.

The respondent having provided no evidence that the claimant received his entitlement to annual leave the Tribunal awards €552-42, being the equivalent pay for eight per cent of the hours worked in 2009, under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)