

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE - *claimant*

**CASE NO.**  
UD439/2010  
MN403/2010

against

EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. D. Morrison  
Ms. A. Moore

heard this claim at Letterkenny on 24th August 2011

#### Representation:

Claimant: Terence Sweeney, Solicitors, Carnmore Road, Dungloe, Donegal, Co Donegal

Respondent: Ms Aine Murray, Patrick J Sweeney, Solicitors, Canada House, Meenmore,  
Dungloe, Co Donegal

The determination of the Tribunal was as follows:

Dismissal was in dispute so it fell to the claimant to give his evidence first.

#### **Claimant's case**

The claimant gave direct sworn evidence he commenced working in the butchers shop in 1981 and the respondent took over the business in 1989. He and the respondent always had a good working relationship.

On Monday 10<sup>th</sup> August 2009 the respondent had got a box of spare ribs. The next day 11<sup>th</sup> August 2009 the respondent was on his normal day off, and the claimant explained he was selling out of these spare ribs. He telephoned the respondent to see where he could order more spare ribs and explained to him he had almost sold out of these. The respondent informed he would telephone the supplier but the claimant said he would do it. The respondent replied "what am I supposed to do I can't make them". The claimant continued working in the shop and about 10 to 15 minutes later the respondent arrived in to the shop and

the first thing he said was where do you have a problem, the claimant replied in the negative. The respondent came in around to the counter and asked him who wanted the spare ribs, he explained to him no one wanted them but they were selling out. The respondent then said to him "do you know what you will do throw off your apron and go away home". He thought the respondent was joking and went to bring a tray of chops to the counter but then the respondent repeated himself and added that it was too bad that a man could not take a day off.

He explained that after the respondent had said it a second time he had no doubt so he did what he was told and said "after all these years together I am sorry we are parting like this".

There was no mention of the claimant being placed on a three day week on the 11<sup>th</sup> August 2009. He did not walk out of the shop he was asked to leave. A three day week had been discussed about six weeks prior to his dismissal; this discussion had arisen when the claimant had asked the respondent about how business was going. He had informed the respondent that he did not mind doing a three day week but the respondent had told him it would not be necessary. He was referred to the respondents T2 which states that when he returned to the shop two weeks later the respondent asked him to come back to work, the claimant could not remember this. He recalled that he was sick for three weeks with suspected swine flu after he was dismissed and had not contacted the respondent in this period.

He then received a letter from the Department of Social Protection seeking his P45 so he contacted the respondent's wife who told him to leave the forms in the shop which he did. He continued to return to the shop every Monday to pick up the completed forms. It transpired that the respondent was having difficulty with their accountant and he eventually received his P45 on the 21<sup>st</sup> July 2011.

It was incorrect that the respondent had offered him his position back. Around November the respondent's accountant informed the claimant that the respondent was willing to take him for a couple of days. He called down to the shop that evening and the respondent asked him was he interested in working for 2/3 days a week at a reduced wage and told him he would call out to his house to see him. The respondent never called out to see him.

Under cross examination he explained that there were two places that supplied pork ribs to them. He telephoned the respondent to see where he had obtained the ones in stock. He hung up the telephone on the respondent as he told him "to do what you're supposed to do". It was incorrect that there was a full box of ribs on the premises when the respondent came in that day. He was referred to his T1A and it was suggested to him by the respondent's representative that it was unreasonable for him to think he was dismissed when the respondent had said to him "Do you know what you'll do Throw off your apron and away you go home". The claimant explained that the respondent had used this phrase twice and also added that he would run the business himself.

In the twenty years he had been working with the respondent 90% of that time they got on. He did walk out of the place before, on this occasion the respondent's wife had telephoned him to return. He could not recall the two other occasions that the respondent's representative put to him. The respondent had never asked him to leave the premises before. He denied that when he called to the shop 2/3 weeks after the incident that he told the respondent he was well rested after his time off and was ready to come back. Nor did he say to the respondent that if he gave him his redundancy he would work 2/3 days a week for him. He did ask if he could have his statutory redundancy but nothing ever came of this. It was put to him that the respondent would

say in his evidence that the claimant had said on the day “one of us is here too long” and walked out. The claimant denied this. He did return to the shop that day as he had to get his wallet and keys.

In reply to questions from the Tribunal if the respondent’s wife had contacted him after the incident and asked him to return he possibly would have. The respondent did not respond to him when he said he was sorry they were parting like this after all the years. He had no grievance procedure or contract. He did think that there was a possibility he would work there again, however a return to work offer was not made until the end of November.

## **Respondents Case**

The respondent gave direct sworn evidence. On the 11<sup>th</sup> August 2009 he was on his day off at home when the claimant telephoned him. The claimant was enquiring about the pork ribs, he told him there were ribs there and the claimant told him they were all gone. He told the claimant that he would need to go to Glenties and the claimant responded by saying “if you’re not interested in selling ribs, that’s okay smart arse and hung up the telephone.

The respondent went to the shop where he discovered that the box of ribs was  $\frac{1}{2}$  to  $\frac{3}{4}$  full so he knew that they would have enough until Wednesday. He noticed that there was no mince so he put on his butchers coat to prepare some and commented to the claimant it’s too bad that he could not take a day off. The claimant replied “dead right one of us are here too long” and walked out.

He recalled other incidents where the claimant had walked out. In 1994/1995 when the claimant had walked out, he had telephoned the claimant and asked him to return to work. In 2000 after another walk out the claimant had telephoned him and had requested to come back. In 2004/2005 his wife on another occasion had telephoned the claimant to arranged for him to return to work. On this occasion 11<sup>th</sup> August 2009 he did not ask the claimant to return to work as he always came back. He has not replaced the claimant and the door has been opened for him since. He had not taken a day off since the claimant left.

When the claimant left he still frequented the shop, on one day the claimant he commented to him that he was well rested and that he (the respondent) must be tired and he was ready to come back to work. He told the claimant that they would discuss it and suggested a few days a week. The claimant asked that he start the process of getting him his statutory redundancy and he would come back on a three day week. He and the claimant had a good working relationship for 20 years.

He did not dismiss or nor was it his intent to dismiss the claimant on the 11<sup>th</sup> August 2009. He arrived in the shop that day he put on his butchers coat and the claimant took his off. On the day he did not recall what the claimant had said to him on the telephone, he had just seen things to be done and had got on with it. He did say to the claimant “it’s too bad a man couldn’t take a day off” but there was no anger in this, it was like a husband and wife tattling.

Since the claimant left he has had no day off as the shop is opened six days a week. He had to close the shop to attend this hearing and on one other day to visit his accountant to sort out his accounts. Since the downturn in the economy he could not commit to employing the claimant full-time but maybe three days a week.

Under cross-examination he had communicated to the claimant that his job was still there, he did tell the claimant he would call out to him some evening but never did. The claimant knew his job was still there and even now it is still available to him. He wouldn't say he was annoyed on the day of the incident but he did have to go to the shop to check the stock of the spare ribs. He never told the claimant to take off his apron and go home nor that he would run the business on his own. He had not contacted the claimant about coming back as the claimant always returned over the years. After the incident when the claimant came in to the shop they had been talking away with each other. He was annoyed when he heard that the claimant had secured another butchery position as he always thought he would return to work for him.

It was put to him that the first time he initiated contact with the claimant was on the first day of his new job. His accountant had contacted the claimant the week before this. He can't recall what he offered the claimant as they had so many talks around him coming back, he offered him whatever he was getting and taking pay cut of €20.00 per day and another was a three day week.

He denied it was only in December that he had made any offer to the claimant as the claimant was in and out of the shop all the time. He never sacked or dismissed the claimant.

The respondent's wife gave evidence on his behalf. She looks after the books, collects monies, billing and cleans the premises. On four occasions over the 20 years the claimant was employed he walked out. In 1994/1995 the claimant walked out and after a cooling off period she asked her husband to contact him. In 2000 the claimant had contacted them about returning. In 2004/2005 she contacted the claimant as she felt sorry for husband who was working six days a week.

About two weeks after the incident on the 11<sup>th</sup> August 2009 the claimant telephoned her regarding the social welfare forms and she told him to drop them in to the shop. She did not ask the claimant back on this occasion as she did not have to work with him and also it was unprofessional of him to walk out. This was the claimant's way of dealing with disagreements. After the claimant left her husband was in regular contact with him. About 3 to 4 weeks later she suggested to her husband that he come to some agreement with the claimant and offer him 3 to 4 days a week until things turned around.

In reply to questions from the Tribunal, this was the first time the claimant had signed on and she thought it would be until the dispute was sorted between the claimant and her husband.

The respondent's representative in her closing submission referred the Tribunal to a number of cases including Turner –v- DT Kean (1978) IRLR 110 and Gallagher –v- H Harkin Planthire Limited EAT MN1538/2009.

### **Determination**

The Tribunal having carefully considered the evidence adduced at the hearing find that the claimant was dismissed. The case is distinguished from precedent cases on the grounds that the words spoken in the present case could be reasonably understood as meaning the claimant's job was being terminated whereas the "terminating words" in Gallagher –v- H Harkin Planthire Limited EAT MN1538/2009 fell short of this.

Having reflected on the circumstances of the case the Tribunal award the claimant the sum of

€2830.80 under the Unfair Dismissals Act 1977 to 2007.

The Tribunal established through the evidence given by the claimant that he was not available for work for part of his notice period and award the claimant €1685.00 under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

There was no claim under the Organisation of Working Time Act, 1997 before the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)