

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.

UD984/2010
MN955/2010

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: Mr P. Hurley
Members: Mr. W. O'Carroll
Ms H. Murphy

heard this claim at Galway on 9th February 2012 and 26th April 2012

Representation:

Claimant(s) : Purdy Fitzgerald, Solicitors, Kiltartan House, Forster
Street, Galway

Respondent(s) : Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3

Claimant's Case

The claimant commenced working as a delivery driver and salesman for the respondent company in September 2007. He delivered the respondent's food products to stores in his locality. He enjoyed a good working relationship with his employer initially but following a workplace accident in April 2009 this previously good relationship deteriorated. As a result of his accident he was absent from work until August 2009 and on his return he provided his employer with a fit to return to work certificate from his doctor. The certificate also stated that due to his ankle injuries he would be reduced to working at a slower pace.

On his return to work his relationship with his employer became strained. He was put on shorter days on a 6 day week basis without any consultation, as opposed to the 5 day week which he had worked heretofore. His total weekly hours of 48 hours remained the same. He was told that he had to work harder due to the economic downturn and was given work schedules which were impossible to achieve. He was asked to attend a meeting on 10 October 2009. It transpired that

this was a disciplinary meeting but he was not informed of this in advance of the meeting. At the meeting he raised the issue of having to work a 6 day week and also concerns that the footwear supplied by the company was not supporting his ankle. He was accused of breaking a hand held machine which he had not done as the machine had just stopped working. The company raised other issues including merchandising standards, the length of time taken to do deliveries, overloading of products on shop shelves and issues with the new bakery manager. The meeting concluded and the employer stated the facts would be considered and a decision would be made. The claimant continued working for the respondent.

Subsequently, on 22 October 2009 the claimant was issued with a letter inviting him to attend a reconvened disciplinary hearing scheduled for 24 October 2009. He was suspended on full pay and informed that further information had come to light since the meeting of 10 October 2009. He was not paid for some days while on suspension. The allegations against him were listed in the letter of 22 October 2009. The claimant felt that he required legal advice to deal with the allegations raised and informed the company by way of letter dated 23 October 2009 that due to the short notice he would be unable to attend the meeting scheduled for 24 October 2009. The meeting was re-scheduled for 27 October 2009 but did not take place on that date and was re-arranged for 29 October 2009.

The claimant addressed the allegations put to him at the meeting on 29 October 2009 and rebutted the allegations. He provided his employer with a prepared statement and also raised some grievances with his employer. He felt that he had been victimised, harassed and bullied since he suffered his ankle injury and expressed these grievances in his prepared statement. In his statement he accepted that the standard of some of his work may have been below standard, but pointed out that the company were informed via the note from his doctor that his work would be slower and consideration must be given. He did not resume work after this meeting as he was so stressed and the whole situation had got to him. He was subsequently referred to a psychiatrist by his doctor and he provided his employer with a medical certificate for the period from 5 November 2009 to 19 November 2009. Following the disciplinary hearing the company issued him with a first and final written warning but the grievances which he had raised were not addressed. He was given the opportunity to appeal the decision and he did so by way of a comprehensive letter dated 9 November 2009 where again he outlined his grievances. An appeal hearing was then scheduled for 20 November 2009. This was later rescheduled for 30 November 2009. He attended the appeal hearing and provided his employer with a medical certificate stating that he was fit to attend the hearing but was not fit to resume work for a further 2 to 3 weeks. His employer stated that the meeting could not proceed if he did not have a fit to return to work certificate and the meeting did not proceed.

The claimant wrote to his employer by way of letter dated 4 December 2009 informing them that he was forced to tender his resignation. He felt he had no other choice but to leave as his health and family life were suffering. He subsequently received a letter from his employer dated 11 December 2009 inviting him to attend a meeting in an attempt to resolve the grievances. This was the first occasion they had mentioned addressing his grievances and as far as he was concerned this was too little and too late and no further meeting took place. He wrote to his employer on 23 December 2009 informing them inter alia that he had a number of legal avenues open to him should he wish to pursue the matters further and requested his P45 and outstanding monies. The company replied to him on 5 January 2010 accepting his resignation and informing him that he would be paid on his next normal pay date and his P45 would be issued with his final payslip.

Since the termination of his employment he worked only casually in the year 2010 earning a total of €880.00 and earned €7600.00 in 2011. Other than those earnings he has been in receipt of a Social Welfare entitlement.

A former employee of the respondent company (SW) gave evidence in the claimant's case. He told the Tribunal that the claimant and directors of the respondent company had an extremely good relationship. The claimant was considered as the go to guy by the respondent. He had witnessed the claimant's accident and while the claimant was on sick leave the respondent would ask if he was in contact with the claimant during that period. The claimant returned to work in August 2009 and there was a difference in the relationship. The relationship now appeared strained and the normal banter and reliance by the respondent on the claimant no longer existed. There appeared to be tension between the parties and often hostility.

Respondents Case

PL director of the respondent company told how he advertised the position of sales and delivery driver in a local paper. The claimant applied for the position had relevant experience and initiative. PL offered him the job and the claimant commenced employment September 2007. The claimant became like an extended family member and got on well with the family. Following an accident in April 2009 the claimant was on sick leave. Regular contact was maintained with him and he returned to work in August 2009. The claimant had taken annual leave following his return from sick leave and requested further holiday leave during the Halloween period but was refused this leave as he wasn't due holidays. It was at that stage the claimant's attitude changed.

Following complaints from customers PL called the claimant in for an informal meeting. The bakery manager (PM) was also present. It wasn't intended that the meeting be a disciplinary meeting however during the course of that meeting he referred to it as a disciplinary meeting. In reference to the claimant working six days per week PL explained that on returning from his accident the claimant had requested to work six short days rather than five long days and this request was facilitated. At that meeting discussions relating to customer complaints and a hand held device used for deliveries and ordering took place.

A follow up disciplinary meeting was held on the 29 October 2009 and because further issues had come to light a decision was taken to issue a first and final written warning. This letter issued on the 4 November 2009. The reasons given for this decision included the claimant having broken the hand held ordering device which was slowing down the delivery and ordering process and written complaints from customers which was potentially damaging to the business.

In cross examination the witness said that he had hastily referred to the meeting on the 10 October as a disciplinary meeting following being laughed at by the claimant. He said this was an error. With regard to the hand held ordering device PL explained that the manufacturers had confirmed in an email dated the 19 November 2009 that the device was water damaged. He denied disciplining the claimant in advance of any investigation into the matter. PL denied the claimant was bullied and harassed following his return to work after his accident and was shocked to read of such allegations. As regards investigating the allegations of bullying and harassment with the claimant he said he was not in a position to do so as the claimant was on sick leave and unfit to work from that date. He could not explain why the claimant's hours had increased following the agreement to work six short days.

The respondent (SL) outlined her role managing the day to day administration of the business. She was bewildered by claims that following returning from his accident the claimant was treated differently. A request by the claimant for holidays over the Halloween period she had refused as she and PL were going on holiday during that period and also the claimant did not have sufficient holiday time to take. She explained it was then the relationship became strained and she received correspondence from the claimant's solicitor. She added that the allegations of bullying and victimisation were a complete surprise and if true she would have known. As the claimant had not named an aggressor she was unable to investigate the allegations. Following the final written warning she accepted that PL should not have been named as the appeals officer. She was unavailable to conduct the appeal. In reference to the claimant being paid during the suspension period she stated that he was not available on certain days during the suspension which was a condition and therefore he was not entitled to pay for those days. She was satisfied that the claimant was paid for the days to which he was entitled.

Determination

The Tribunal carefully considered the evidence adduced. In the case of constructive dismissal there is an onus on the claimant to clearly express his concerns and to avail of all procedures to seek redress from his employer.

The claimant gave evidence that at the meeting on the 10 October 2009 held out by the respondent to be a disciplinary meeting he had not received prior notification and was not informed of any case against him. At the subsequent meeting of the 29 October 2009 the claimant made clear allegations concerning bullying, harassment and victimisation which he read out in a statement at the meeting. The employer failed to respond or address the grievances outlined in the statement. The claimant was thus frustrated in seeking redress.

The Tribunal is of the view that the working conditions for the claimant significantly if not sharply deteriorated after he had resumed work in August 2009 following his injury. The evidence of the claimant's second witness (SW) fortifies or strengthens the claim.

Cumulatively the Tribunal finds the claimant has reached the standard required to establish a claim of constructive dismissal.

In all the circumstances the Tribunal awards the claimant €32,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn by the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)