

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE

UD1996/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms B. Glynn  
Members: Mr P. Pierson  
Mr O. Nulty

heard this appeal at Longford on 17th January 2012 and 13th April 2012

Representation:

Appellant: Orlaith Higgins, John J Quinn & Co, Solicitors, Earl Street, Longford

Respondent: Oliver O'Sullivan & Co, Solicitors, Castlepollard, Co Westmeath

*This hearing came before the Tribunal by way of an appeal against the recommendations of a Rights Commissioner reference number r-084758-ud-09/SR.*

#### **Appellant's case**

At the outset the T1A was agreed. The appellant received €550 net per week.

JF, the appellant, in his sworn evidence stated that he began work with the respondent in October 2004. The parties knew each other since school and had been friends. The business was steel fabrication and the location of the workshop was at the back of the respondent's mothers house. Breaks and lunch were sometimes taken in the house.

The employment was uneventful until Friday 15<sup>th</sup> May 2010. The appellant was working in Mullingar and on his return to the workshop/yard he locked up as usual and was heading home. MD, mother of the respondent, called him into the house. He was met by the respondent's two brothers, father and mother. They accused him of taking €150,000 and said they knew it was him and wanted it back. They said the money was taken in or around St Patricks Day.

JF stated that he was threatened; he was told he would be killed and nobody would ever find him. He didn't know what to do; he had never taken anything in his life. He asked about KD his direct employer and was told KD couldn't look at him, if he did he would kill him. After about 30mins of shouting and threats JF telephoned his partner and asked her to come to the house.

He telephoned a Garda and things quietened down after his arrival. JF stated that the Garda told him to go home and stay away until things settled down.

A few weeks previous to this incident he had received a text message saying "leave the money back". He did not recognise the number but did report it to a local Garda who said maybe it was somebody messing. JF got further text messages saying "the deadline is tonight". MD admitted to sending the text messages and had got a new SIM in order to do so.

JF went to his solicitor on the Tuesday or Wed after the incident. The solicitor looked for his P45 and it took 6 months.

JF stated that he was paid by cheque for €400, a separate cheque for €100 and €50 cash. The T1A was already agreed and the appellant's P60 showed earnings of €20,072. The appellant got a job in Sept 2010 driving for 20 hours per week.

Under cross examination JF stated that he had not spoken to the respondent or his family since. He did not go to work on the following Monday morning as he was told he was going to be arrested. Asked if he stated to his partner on the evening in question that his job was finished anyway he said that MD stated that if the money was left back by Sunday his job would be there for him. When asked about the demeanour of his employer in the 2 months after the money was allegedly taken JF said he never noticed anything different with him, all seemed normal.

Garda R in his sworn evidence stated that he attended the house of MD on the evening in question where a dispute was taking place. He spoke to both parties and advised JF to leave. There was a definite air of tension. He was only there to ensure there was no breach of the peace. He didn't recall his exact words to JF but doubted he would have said not to contact them (the family) anymore. He took no notes, just names. He did advise JF to go to his local Garda station and make a statement. The investigation is still on-going with no suspects.

JL, partner of JF, stated that he called her and asked her to come to the house, when she arrived everybody was shouting. JF told her that he had been accused of taking €150,000. MD said that there was no job until he left the money back and she hoped they enjoyed their new home with her money. JD said that the appellant would never live long enough to spend it. JL feared for the appellant's life. Asked if she heard her partner being dismissed she said MD said leave the money back and your job is here. They have three children and did ring KD but got no answer, they also sent him a text but got no reply.

OH solicitor for JF in her sworn evidence stated that on 18<sup>th</sup> May JF and his partner came to her practice seeking advice. She was advised by her principal to write to the respondent, his mother and brothers to seek clarification. On 25<sup>th</sup> May she received a telephone call from KD, he said there was no job for the appellant as he had taken someone else on. She asked a colleague (off record) to speak with Garda in Mullingar, nobody knew anything about the theft.

## **Respondent's case**

The respondent (KD) told the tribunal that he did not dismiss the appellant. KD was unaware of the meeting that took place on 15<sup>th</sup> May 2010 until after the event. On the day in question KD had left the yard at about 3pm and did not return until after the appellant had left. KD denied that the meeting was orchestrated by him.

KD decided not to contact the appellant when he heard about what had happened on 15<sup>th</sup> May 2010 and told the Tribunal that he waited to see if the appellant would show up for work on the following Monday. He could not say whether he had missed calls from the appellant but confirmed that he did receive two text messages from him and did not reply to them. KD could not recall telling the appellant's solicitor that he had replaced the appellant and told the Tribunal that he had not taken on anyone else since the appellant left.

With regard to the missing money KD had no record of this cash. The money had disappeared around 17<sup>th</sup> March 2010 but KD was not aware of the exact date it was reported to the Gardai as his Mother was looking after the matter. However KD suspected that the appellant had taken the missing money. His suspicions were based on the appellant's demeanour and body language in the weeks up to 15<sup>th</sup> May 2010.

MD (Mother of the respondent) confirmed that she, her sons and her estranged husband had met with the appellant in MD's house on 15<sup>th</sup> May 2010. She suspected that the appellant had taken the money, however she denied that the appellant was threatened or accused of taking the missing money. MD asked the appellant to call his partner to the meeting and also confirmed that a member of An Garda Síochána was called to the house by the appellant.

DL (a brother of the respondent) was at the meeting of 15<sup>th</sup> May 2010 but denied that he had threatened the appellant. DL also worked along-side the appellant as "bouncer" in a local night club and despite the missing money and his Mother's suspicions there was no animosity between DL and the appellant in the weeks up to 15<sup>th</sup> May 2010. However when the night club owner learned of the situation she let both of them go, until the matter was resolved.

## **Determination**

This is an Appeal against the recommendations of a Rights Commissioner who found that the Appellant was not unfairly dismissed due to the fact that the dismissal did not emanate directly from the Appellant's employer.

The Tribunal heard evidence over two days. The atmosphere was, at times, fraught with animosity and hostility and it is impossible to avoid reference to this, as it permeated the hearing. In addition, it is clear from the evidence given that this atmosphere also formed the back drop to the facts of the case which included anonymous texts which the Respondents mother admitted sending to the Appellant.

The Tribunal has carefully considered the evidence and submissions made by all parties and in particular the evidence given by the solicitor for the appellant, to which they have attached great weight.

It became apparent from the evidence given by the Respondent and his family that while the Respondent was the named employer of the Appellant on paper, the business was a family run

business by, not alone the Respondent, but his brothers, father and mother, some of whom also worked along side him. This is corroborated by the fact that the Respondent's office is at the back of his Mother's house and she retained monies on his behalf.

The Appellant gave evidence of being 'ambushed' on the 15<sup>th</sup> May 2009 in the house of MD by members of the Family and threatened with violence. While there is a conflict of evidence between the parties as to what occurred and what was said in the house, it is clear from the evidence given that, firstly, the confrontation was planned and that the Respondent was aware of same and, secondly, that the Appellant was frightened and believed that the Respondent's family meant him harm. The Tribunal note that the evidence of Garda Reilly of 'tension', when he arrived at the house, as a result of which he advised the Appellant to leave. While the evidence given by all parties in relation to the termination of employment was contradictory, the Tribunal accept the evidence of the Appellant that his employment was terminated that day and it is clear that this termination was on the authority of and as discussed with the Respondent. This is corroborated by the fact of the Respondent's refusal to take any calls or reply to any texts from the Appellant after the 'meeting' and his informing the Appellant's solicitor of his engaging of another person within a week of the meeting.

The most compelling evidence was given by the Appellant's solicitor namely Orla Higgins of J.J. Quinn & Sons from whom the Appellant sought evidence two days after the incident in the Respondent's mother's home. She informed the Tribunal that she wrote to the Respondent on the 22<sup>nd</sup> May and received a phone call from him on the 25<sup>th</sup> May, in which he informed her that he had no work for the Appellant in addition to informing her that he had employed another person.

In the circumstances the Tribunal finds that the Appellant was indeed unfairly dismissed. Accordingly the Tribunal upsets the decision of the Rights Commissioner and awards the Appellant a sum of €25,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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