

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD2129/2010

MN2087/2010

against
EMPLOYER - *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Fahy B.L.

Members: Mr. W. O'Carroll
Ms H. Henry

heard this claim at Galway on 30th May 2012
24th September 2012
and 18th January 2013

Representation:

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

Respondent(s) : Mr Paul McGettigan BL instructed Sheehan & Co, Solicitors, Augustine
Court, St Augustine Street, Galway

Respondent's Case

(BC) for the respondent gave evidence that he operated a bakery and distribution centre in the west of Ireland. The business operated 7 days per week, 20 hours per day and had 6 employees. The claimant worked on the road doing general sales work. Following a downturn in business in 2007 the claimant's role changed to one of dispatching and checking. He was no longer required to work on the road on a full-time basis. He worked on weekly night shifts, he did a day shift on Saturdays and made deliveries on Sunday mornings.

By 2009, due to further downturn in business the company had to implement changes in order for the business to survive. The witness gave evidence that he spoke with each employee individually concerning proposed changes. It was proposed to reduce the hours of all employees and the majority of the employees accepted the proposed changes. The witness wrote to the

claimant on 9 August 2010 informing him of the proposed changes and seeking information on any alternative plan that he (the claimant) may have that would accommodate savings. The witness did not agree to the proposed changes and wrote to the company on 12 August 2010 raising his objections to the proposed changes. He also raised issues of Health & Safety risks and issues of bullying within the company. Furthermore he raised issues relating to (BC's) salary, pension fund and a "fiddle fund". This letter was addressed to (BC) and cc'd to the Chief Executive Officer of the respondent's major supplier (IP) who had no involvement in there-organisation process. The witness was shocked and horrified to receive this letter and carried out an investigation meeting on 1 September 2010. The claimant attended the meeting along with his solicitor. (BC) gave evidence that he asked the claimant where he sourced the information contained in his letter of 12 August 2010 and the claimant replied that he sourced the information from an office filing cabinet. (BC) told the Tribunal that this information had been accessed by the claimant without permission. He gave evidence that the claimant was asked if he was making a formal complaint of bullying and the claimant replied that he was not pursuing the matter. He was then informed by the claimant's solicitor that the letter of 12 August 2010 had not been cc'd to the Chief Executive Officer of the respondent's major supplier. However at no time was he given an undertaking that this letter would not be sent to his major supplier.

The claimant was then invited to a disciplinary hearing by way of letter dated 16 September 2010. The purpose of this disciplinary hearing was to afford the claimant the opportunity to state his case and give a detailed explanation in relation to the matters listed in the said letter which was opened to the Tribunal. The disciplinary hearing took place on 20 September 2010 and was attended by the witness and the company accountant for the respondent. The claimant attended with his solicitor. The outcome of this disciplinary hearing was conveyed to the claimant by way of letter dated 22 September 2010. The company terminated the claimant's employment with immediate effect and the reasons for his dismissal were contained in that letter which was opened to the Tribunal. The Tribunal was told that there had been a massive breach of trust in the employee/employer relationship. The witness gave evidence that he carried out the investigation and disciplinary hearings. He told the Tribunal that the claimant admitted to accessing confidential financial information from a locked office. The claimant was one of 4 key holders to this office and was in a position of trust. The witness believed that the claimant was going to use the confidential financial information as a form of leverage or blackmail and his actions amounted to a massive breach of trust. He gave evidence that the company does not have a company handbook and the claimant did not have a written contract of employment. The claimant was offered the right to appeal the decision through the state's Industrial Relations mechanisms.

The witness gave further evidence that he took over the distribution aspect of the business from his former employer known as (IP) in May 1994. (IP) continued to supply the bakery products and he offered the claimant a position as a self-employed sales and marketing representative. The claimant accepted this position and issued monthly invoices for his services. From 1994 until 2007 he gave evidence that the claimant was self-employed and he (the witness) did not deduct tax or PRSI from the claimant nor did he issue a P60 annually. In 2007 (IP) put extra sales people working on the road and the claimant's job as a contractor basically became redundant at that time. After some consideration the respondent gave him a position in night dispatch and doing some occasional deliveries. He became an employee at that time and remained so until his dismissal in 2010. He was paid well in excess of the average wage in the bakery business.

Claimant's Case

The claimant gave evidence that he worked for (IP) from 1985 until 1994. Following the privatisation of their sales and distribution business he was made redundant by (IP) and offered a position as a sales supervisor by (BC). He accepted the position and continued to work for (BC) until his dismissal in 2010. He outlined his working duties to the Tribunal and gave evidence that he paid his own tax, made class S insurance contributions and reported to (BC). Invoices for his work were prepared by (MW), accountant for (BC) and he (the witness) signed and submitted them. While invoices were written on the documentation he did not view them as invoices. In June 2007 (BC) informed him that (IP) were appointing a sales manager to his area and he was no longer required in that role. As a result of this he had a further discussion with (BC) in June 2007 and assumed new duties which resulted him doing night work. He also worked Saturdays and Sundays as part of this new pattern. This pattern continued in place until his dismissal in 2010.

He gave evidence that the business boomed throughout the 1990's and the depot exceeded targets by 9% - 11%. He received one pay increase in January 2000 and that was the only pay increase he received from 1994 to 2010. He never received any pay increase in line with national pay agreements. In July 2010 (BC) informed him that cuts and changes to his working hours were to be introduced due to a decline in business. This would have resulted in a cut of 20% to his working week and a 40% pay reduction. The proposed changes were outlined to him by way of letter dated 9 August 2010 from (BC) and were being introduced without any discussion or negotiations. He did not accept these proposed changes and replied to (BC) by way of letter dated 12 August 2010. He believed that there were Health & Safety issues involved and outlined those issues inter alia with other concerns he had in the said letter of 12 August 2010. While the letter was marked as being cc'd to the CEO of the respondent's major supplier he did not actually copy same to the CEO and informed (BC) of this fact. He believed that (BC) was taking unfair advantage of him. (BC) replied to his letter on 20 August 2010 and two investigation meetings were conducted on 1 and 8 September 2010. The claimant attended the meetings along with his solicitor. (BC) and (MW) attended the meetings on behalf of the respondent. (MW) was also the claimant's accountant and the claimant enquired if this presented a conflict of interest for (MW). (MW) replied that it did not as he was just present to take notes. The claimant subsequently attended a disciplinary hearing on 20 September 2010 and was dismissed by way of letter dated 22 September 2010.

The claimant gave evidence that he accessed cheque journals from an unlocked filing cabinet in an office on the respondent's premises. He was a keyholder to this office and he accessed the information on a number of occasions over the years prior to 2009 and during the year 2009. He did not seek permission to access the journals and was aware that the journals contained confidential company information. He accepted that it was not part of his duties to access these records but felt he was entitled to look at them. He did not force any locks and did not breach confidentiality. This cabinet was never locked, everybody had access to it and the cabinet also held general stationery equipment. He had also been given access to company chequebooks but did not have authorisation to sign cheques. He used the information from the journals to respond to (BC's) letter of 9 August 2010 and to defend himself when his livelihood came under attack. He believed that (BC) was trying to impose cuts which were unfair and unjustified. He did not give any undertaking to (BC) that he would not circulate his letter of 12 August 2010 as it was impossible for him to do so given that the letter was at the

heart of the dispute. He believed that it was unrealistic of (BC) to seek any assurances from him. He did not accept that he held this letter over (BC's) head as he assured him that it had not been sent to the CEO of (IP).

Determination

The Tribunal has considered carefully all the evidence and submissions in this matter. The Tribunal is satisfied that the respondent failed to follow correct procedures in terminating the claimant's employment. The respondent carried out the investigation, also attended the disciplinary hearing and took the decision to terminate the employment. Furthermore the company accountant, who was also the claimant's accountant up to 2007, should not have attended the disciplinary hearing as his involvement with the claimant up to 2007 compromised his role. The Tribunal determines that the claimant was unfairly dismissed from his position. However the Tribunal also finds that the conduct of the claimant contributed significantly to the dismissal. The claimant's letter of 12 August 2010 can only be described as a blatant attempt to "blackmail" the respondent and had little to do with health and safety concerns in the workplace, as was evidenced before the Tribunal. Whilst the claimant indicated that he did not forward the letter of 12 August 2010, as threatened, he nevertheless refused to give an undertaking to the respondent not to forward to a third party but instead continued to hold the threat over the respondent. The claimant's tactic of gaining access to confidential information, of a personal nature, by whatever means and the threat of using this information against his employer, so that changes in working hours proposed, would not take effect, has no place in industrial relations negotiations.

The claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and the Tribunal awards €6,000.00 compensation for the unfair dismissal.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 also succeeds and in this regard the Tribunal determines that the claimant was employed by the respondent from 2007 until the date of his dismissal in 2010, thus the Tribunal awards the sum of €1322.50 this sum being the equivalent of two weeks pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

