

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *Claimant*

UD1367/2008

MN826/2008

WT372/2008

against

EMPLOYER - *Respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr F Moloney  
Ms M Finnerty

heard this claim at Dublin on 17<sup>th</sup> November 2008 and 5<sup>th</sup> and 6<sup>th</sup> March 2009

### **Representation:**

Claimant: In person

Respondent: Mr Gareth Kyne, HR Consultant, Oengus Lodge, Newgrange, Slane, County Meath

The determination of the Tribunal was as follows:

The Tribunal was advised that the claim under the Organisation of Working Time Act, 1997 had been paid and the appeal was withdrawn at the outset of the hearing.

The claimant had brought a claim under the Redundancy Payments Acts. At the hearing the claimant accepted that he had less than the two years service required under the Redundancy Payments Acts, even allowing for the grant of Minimum Notice, such that the claim was statute barred.

### **Respondent's Case**

The respondent is a medium sized enterprise engaged in the manufacture and servicing of brakes and clutches. It has different departments and has both workshop and warehouse facilities. The respondent's employees range from general operatives to skilled personnel and its management adopts a "hands-on" approach. It had been a common practice for some of the male employees, including the claimant, to play table football at lunch breaks. These games were played by pairs of players against each other. The claimant was employed in the workshop.

A young employee who had previously worked with the respondent had recommenced employment in March 2008. The young employee was employed on probation and worked in the warehouse. The young employee said that at first he got on well with everyone employed by the respondent including the claimant. However, the young employee's relationship with the claimant soon changed adversely because the claimant's behaviour became more aggressive while playing the football machines, and the claimant became more threatening to the young employee in particular. Frequently, the young employee was in a pair that had as its opposition a pair including the claimant. The claimant's aggressive behaviour soon extended from the games to the actual workplace. Such behaviour took the form of jeering, taunting and slugging. This occurred up to five times a day and restricted the young employee from doing a proper day's work. When the young employee complained to his supervisor about this he was told to cease playing that football game and generally to keep away from the claimant. However, according to the young employee the claimant did not keep away from him.

The young employee told the Tribunal of at least three instances in April 2008 when he was subjected to unwelcome and unpleasant approaches from the claimant. On 4<sup>th</sup> April 2008 the claimant confronted him in an intimidating way and demanded money from him. While no money exchanged hands the young employee nevertheless reported that incident to his supervisor. Some two weeks later the claimant again physically manhandled the young employee and openly threatened him as he held what appeared to be a homemade silver coloured knuckleduster in one of his hands and against the ribs of the witness. On another occasion the claimant started hammering loudly on a workbench in front of the witness. It also appeared the claimant wanted a transfer from the workshop to the warehouse section.

As a result of all these incidents and of the overall behaviour of the claimant the young employee signed a written statement dated 21<sup>st</sup> April of his complaints in the presence of the respondent's financial controller. It was denied that this was part of a conspiracy to get the claimant sacked and the young employee had no part to play in any possible disciplinary process. The young employee said it was untrue that he ever threatened the claimant or used abusive language towards him.

The warehouse manager said the young employee had approached him in early April over the treatment he was receiving from the claimant. That employee was "shook up" and felt intimidated and harassed by the claimant particularly in respect of the money demands and knuckleduster incidents. Up to that time no complaints had been brought to his attention concerning the behaviour of the claimant and he had always been happy with his work. This manager who was interviewed as part of an investigation into the claimant's alleged misconduct described that young employee as a very soft person.

The warehouse manager was also interviewed regarding the same issue. He told the interviewers and the Tribunal that he witnessed the claimant's mistreatment of the young employee on several occasions and over a prolonged period. This witness claimed that the claimant admitted to him that he possessed a knuckleduster and at times carried it on his person.

The financial controller referred to previous threats linked with the respondent but not directly connected to this case. This present case was brought to his attention by the warehouse supervisor who shortly thereafter obtained a statement from the young warehouse worker. The witness felt that this statement together with a previous unconnected incident merited an investigation. The investigation consisted of the witness and general manager conducting a series of interviews with relevant members of staff including the claimant. The claimant was suspended pending the

completion of that investigation. Prior to that suspension a search of his locker was undertaken and no knuckleduster was found there or elsewhere. The claimant was also given a copy of the young employee's complaints and after reading it said its contents were all untrue.

Following the interviews the witness and the general manager found that on the balance of the evidence given and the statements made that the account given by the claimant was not the truth. The claimant had denied "simple things" and that added to their doubts about his version of events. Both the witness and the general manager went through the complete collected evidence and concluded on the balance of probability that the incidents as reported by the young employee did take place. As a result of those findings the witness together with the general manager prepared and signed a report into their investigation.

It came to the Tribunal's attention that this report, which included the decision that the claimant be dismissed on the grounds of gross misconduct, was completed prior to the disciplinary hearing beginning. The respondent's representative accepted this was procedurally unfair as this decision was reached at the outset rather than at the completion of a disciplinary procedure.

The general manager said it was his decision to dismiss the claimant. He did this on health and safety grounds and in particular on the reported knuckleduster incident. However, other factors were taken into account in reaching that decision. Since the witness accepted the account of the young employee in full he did not believe the claimant's version of events some of which were plainly untrue. The claimant had been aggressive towards other staff but no written warnings had been issued to him prior to these reported incidents. He had no recall of a letter of dismissal being issued to the claimant.

The managing director also referred to an earlier incident of extortion related to the respondent whose effects had some input into this case. Some two months prior to the events in this case the claimant gave notice of his termination of employment with the respondent. However, the issues around that scenario were resolved and the claimant whom the witness called an excellent employee did not leave. He noted that the claimant at times tended to override the respondent's instructions. The Gardaí were informed of the incidents related to this case subsequent to the claimant's dismissal.

### **Claimant's Case**

The claimant arrived in Ireland in April 2006 seeking work and one month later commenced employment as a workshop operative with the respondent. He described himself as a hard working, diligent and honest worker. He found it hard to accept that he was so badly treated by the respondent and regarded his dismissal as unfair. Until April 2008 the claimant had neither received any complaints from his employer nor was he the subject of any written warnings.

On 21<sup>st</sup> April 2008 the claimant was interviewed by the respondent into allegations that he was aggressive towards staff and customers. That interview also extended to particular instances where a young employee accused him of threatening and menacing behaviour towards him. The respondent issued the claimant with a verbal warning for the first allegation and furnished the claimant with a copy of the young employee's complaints and statement into those accusations. The witness told the Tribunal that he did not accept he was aggressive at work either towards his co-workers or to customers.

Having read the statement and complaints of young employee the witness told the two interviewers

that he understood the contents and added that they were untrue. He repeated that assertion to the Tribunal. The claimant denied being in any way aggressive, threatening or menacing towards the young employee. In particular he insisted that he never threatened the young employee at any time and specifically denied those accusations over demands for money from him. The witness was adamant that he never used, produced or in any way confronted that colleague with a knuckleduster. He hardly knew what the word meant and never referred to that implement in any conversation with the respondent apart from the formal interviews. He also emphasised that he never mentioned that item at any time to the warehouse supervisor.

The claimant stated that he brought to the respondent's attention that the young employee had threatened him. That threat occurred earlier than the events reported by the young employee against the claimant. He explained that he played table football as part of a two-man team and had never participated in single matches. Those comments were in response to the respondent's contention that even the "simple things" he told them were untrue. The claimant felt that his dismissal was for other reasons other than those presented by the respondent. The witness declined the respondent's invitation to appeal its decision to dismiss him on the grounds that he "wanted nothing more to do with them". The terms and conditions of his employment stated that an employee "may appeal to the Managing Director (or other appropriate person) if a decision is taken to dismiss you..."

## **Determination**

The claimant had been employed by the respondent from 11<sup>th</sup> May 2006 until 24<sup>th</sup> April 2008 when the claimant's employment was terminated without notice. It was agreed between the parties that the claimant's average weekly remuneration was €563.00 per week.

A young employee made a complaint to the respondent employer on 21<sup>st</sup> April 2008 and the respondent investigated the complaint immediately. The respondent carried out this investigation by interviewing the relevant persons and having investigated the matter decided to terminate the claimant's employment without notice for gross misconduct. This decision was made at the conclusion of the investigatory phase and without providing the claimant with a disciplinary hearing. The Tribunal therefore finds that the dismissal was procedurally unfair.

The young employee had made a statement to the respondent that he had played table football with his work colleagues at break times. When he played against the claimant the claimant was "very aggressive, like taunting and slagging me." After the games the claimant would come up to the young employee's work station "slagging me and stopping me from doing my job". The young employee had asked the claimant to leave the area and stop coming up to him. He said that the claimant had disliked being told to go away and had stayed there, moving products, paperwork and the claimant had stopped the young employee from working. This behaviour had gone on for about three weeks and so the young employee had complained to his supervisor who then told the claimant not to be slagging and messing as no work was being done.

The young employee said in his statement that on 4<sup>th</sup> April 2008 the claimant had "snook up behind me and scared me and laughed. The Tribunal finds that this behaviour and the behaviour described in the above paragraph was in the nature of horseplay in the workplace.

The young employee said that once he had completed picking that order, the claimant asked for money. According to the statement the young employee said he had no money and the claimant got closer and "pushy" (which the Tribunal understands to refer to the claimant's demeanour

rather than physical pushing). The young employee alleges the claimant said “You do have money .... I seen you buy food off Jimmy out of the breakfast van” and young employee says he responded by saying “No [first name of the claimant], I’ve no money and I’m not giving you any money”. The claimant is alleged to have persisted and said “[first name of young person], give me money ... I know you have money ... maybe you have visa or laser ... I need money”. Afterwards, the claimant walked back into the workshop very annoyed. The young employee brought this incident to the attention of his supervisor and the claimant did not approach him again that day or the following week until he came up again when the supervisor was out for a half day. Then the claimant is alleged to have been up at the young person’s work station “slagging and kept hasslin’ me asking me ‘would I ask [name redacted] and [name redacted] to give him a new job in the warehouse working in goods out’. I told him no about six or or seven times, all on different times”.

The Tribunal finds that the above demand for money falls well short of extortion, which is the demand for money supported by coercion, and is regarded as gravely criminal in nature. The Tribunal finds that the behaviour of the claimant as alleged is more in the nature of childish persistence. The Tribunal notes the evidence of the claimant that he bought a can of mineral each day which cost eighty cent and his claim that he was looking for the twenty cent he was short on that day from the young employee.

In his statement, the young employee alleged that on the last occasion the claimant walked up and grabbed him by his ‘... back and said “Look, look, very nice ... this would hurt ... yes [name redacted] ... I’m right ... yes this is good ... I like it”. Whilst he was saying this he was showing me a knuckleduster he was wearing and pushed it up against my back and started laughing and being hyper saying “it’s good yes?”. I replied, “No, [name redacted]” and “Please go back to the workshop ... you’re not allowed up here”. Once I said that, [name redacted] wasn’t impressed. He said “Uh you will see next time you try to come into my workshop .. you will see” and that was the last time he came up to me. However, on the 18<sup>th</sup> April, when I went to get rivets from the workshop, [name redacted] started hammering the workbench loudly while laughing at me.”

The respondent had been provided with evidence from the warehouse manager that the claimant had complained of being attacked with a bottle while in the Clondalkin area and in response to that had made a knuckleduster at work and carried it with him when he was out and about. The warehouse manager said that the claimant had told him that he had been stopped by the Gardaí and had been told it was illegal. The warehouse manager said that he had been told about the incident with the knuckleduster and had confronted the claimant about it. The warehouse manager said the claimant had admitted to having one but he said that he did not bring it in to work. The warehouse manager said he told the claimant to leave it at home and make sure it stayed there and the claimant had agreed.

The claimant denied having possession of a knuckleduster. The Tribunal finds that the respondent acted reasonably in concluding that the incident with the knuckleduster occurred and finds the evidence of the claimant to be less credible than that of the other witnesses.

The respondent terminated the employment of the claimant for the offence of extortion and intimidation. The Tribunal does not find that this conclusion was fair, reasonable or proportionate. The Tribunal notes that the claimant is a large man with a boisterous manner. When challenged his tendency is to be quite assertive. He is a foreign national with imperfect English and a hearing problem which he says may be why he speaks too loudly. It is perfectly

understandable that the young employee had reason to complain to his line manager who was the warehouse manager and it appears that the warehouse manager was handling the matter in a reasonable and proportionate manner. It appears that the claimant had been engaging in inappropriate horseplay, that he had been badgering the young employee in relation to at least two requests and had taken the young employee's refusals ungraciously. It also appears that the claimant probably fabricated a knuckleduster in the workplace and was showing it off to the young employee in the course of more horseplay. The Tribunal finds that the claimant was making a nuisance of himself to this young co-worker. The warehouse manager was aware of the incidents and the claimant was responding to correction by the warehouse manager to a substantial (albeit insufficient) extent. When the matter came to the attention of more senior management they regarded the matter much more seriously as intimidation and extortion. The Tribunal does not accept this conclusion of gross misconduct by way of intimidation and extortion to be well founded on the evidence and believes that the disciplinary problem that undoubtedly existed with the claimant should have been dealt with by escalating disciplinary sanctions which could eventually have concluded in dismissal. The termination of employment was premature and disproportionate in all the circumstances.

The claimant claims that he was out of work for about 30 weeks and suffered a loss of approximately €16 000.00 as a result of being unfairly dismissed. The Tribunal is satisfied that the claimant's own behaviour contributed substantially to his own dismissal and reduces the award of compensation accordingly.

The Tribunal also finds that the misconduct was not gross misconduct and awards one week minimum notice.

The Tribunal therefore finds that the claim under the Unfair Dismissals Acts, 1977 to 2001, succeeds and awards the sum of €8 000.00 to the claimant and the Tribunal also finds that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, succeeds and awards the sum of €563.00 to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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