

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

MN393/2007  
WT170/2007  
UD536/2007

against

2 Employers

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr J. Hennessy  
Mr D. McEvoy

heard this claim at Waterford on 1st July 2008  
and 5th November 2008

Representation:

Claimant

Ms Elizabeth Walsh B.L., instructed by Ms Gillian Mahony,  
Mary T. Ronayne, Solicitor, The Brewery, Shandon,  
Dungarvan, Co. Waterford

Respondent :

Mr Duncan Inverarity, BCM Hanby Wallace, Solicitors,  
88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Dismissal was in dispute in this case.

**Summary of the Evidence**

Following a successful interview with the respondent (at a time when it was recruiting managers) the claimant commenced employment with the respondent on 14<sup>th</sup> June 2004. Following a learning period in a number of stores the claimant spent under two years as fruit and vegetable manager in the Dungarvan store and ultimately was transferred to the Waterford store on 9<sup>th</sup> October 2006. His assessment for 2005, which had been done in January 2006 was positive: he was found to be reliable, hard working, conscientious, polite, helpful in all situations, having a hands on approach, good product knowledge and a laid back attitude. The claimant enjoyed his work. The evidence of the Regional Manager (RM) for the south east region and the claimant was that they had a good relationship, bounced ideas off one another and RM had confidence in him. The claimant was given to understand by RM that he had done a very good job in Dungarvan. RM's evidence was that the fruit and vegetable section did not do as well as expected but that this could not be attributed to the claimant.

At the respondent's request the claimant transferred to the Waterford store. The claimant was enthusiastic and full of ambition about his transfer but felt deflated after his introductory meeting with the store manager (SM). At this meeting SM told the claimant, "It is my way or no way. I am tough but fair". Notwithstanding this comment the claimant still wanted to prove himself and set about introducing new systems. Over the next weeks SM shouted at him in front of his staff and the delivery people and it was not uncommon for him to use abusive language in such instances. While SM denied making the above statement during the introductory meeting he had made clear to the claimant that he would have to work and perform and that he (the claimant) would see him a lot around the store. The claimant was on a week's holidays in October and phoned in sick the following Monday. Subsequently SM had a back to work meeting with the claimant and told him that he would not expect him to be off work with "sniffles or the flu".

Goods are checked in at goods inward except for the fruit and vegetables which are checked in by the fruit and vegetable manager in the store. SM instructed the claimant to cover for the goods inwards manager over Halloween week, which is one of the two busiest weeks of the year in the fruit and vegetable section. It was SM's evidence that on 3<sup>rd</sup> November 2006 he spoke to the claimant about delivery dockets which had not been filled in and about the untidy and disorganised state of the goods inward area and gave him a week "to get his act together". It was the claimant's recollection that he was only spoken to about the dockets not having been written up correctly.

On 4<sup>th</sup> November 2006 RM visited the store and, as normal, entered through the goods inwards entrance and found it unmanned. SM, who was on a day's holidays, had briefed him on the work team and problems and RM knew the claimant was covering for the goods inward manager. RM met the claimant who was on his way to goods inward. On his inspection of the fruit and vegetable section RM found lots of things were not up to standard the claimant had in the previous store. When RM spoke to the claimant about the condition of the fruit and vegetable section the claimant asked for a private word with him. It was the claimant's evidence that he told RM that he was being harassed, not being left to do his job and being made to look a fool in front of the staff. He told RM that he could take no more of it and asked for his help or a transfer to another store. It was RM's evidence that the claimant said nothing about how SM treated him. RM discussed his store visit with SM on the following Monday.

The claimant was off the following Monday and Tuesday and was due to return to work on Wednesday 8<sup>th</sup> November 2006 but was too upset to face work. On 8<sup>th</sup> November SM contacted RM to inform him that the claimant was absent and that there had been no communication from him. RM undertook to deal with the matter because he had confidence in his relationship

with the claimant. RM phoned the claimant a number of times and left a message asking him to make contact. It was unusual for the claimant not to return his calls. Ultimately, through the intervention of a third party the claimant agreed to take a call from RM and they had a long conversation. It was the claimant's evidence that during the conversation he told RM that he felt low, could not face going in to work and that he was being bullied by SM. However, RM repeatedly urged him to go in and sort out his problem with SM by himself and finally he agreed to do so. RM told him if it did not work out he would intervene. It was RM's evidence that during their telephone conversation the claimant told him that he was being treated "like sh.t" but the only example he could give him was that he was being shouted at. In reply to a specific question the claimant told him he was not being bullied or harassed. While he did tell the claimant to sort it out with SM he told him that he was at the end of the phone and would go down to sort it if necessary. It was the claimant's evidence that he wanted to be transferred to another store and that he had mentioned this to RM in his conversations with him on both 4<sup>th</sup> and 8<sup>th</sup> November.

Following his conversation with RM the claimant had a sleepless night and felt that having involved RM would have made matters worse with SM. He had lost all his confidence and could not face work or SM on Thursday morning; He sent a text to RM saying that he should not have been put in this position. RM denied getting any such text from the claimant. The next day, 10<sup>th</sup> November, the claimant attended his doctor and was certified sick. Thereafter, he submitted medical certificates on a weekly basis to the respondent. All of these, apart from the first one, certified the claimant to be suffering from depression. The claimant sent the first few medical certificates to a manager in the Dungarvan store and they were forwarded to the respondent via internal mail and the rest were sent to SM in the Waterford store.

On both 10<sup>th</sup> November and 14<sup>th</sup> November 2006 SM wrote to the claimant regarding "his unauthorised absence" from work since 8<sup>th</sup> November and his failure to comply with notification procedures but the first letter was sent to a Dublin address although the respondent had his current address. In the claimant's reply dated 16<sup>th</sup> November to the letter of 14<sup>th</sup> November he informed SM that he was suffering from depression, that a medical had been sent to the respondent and a further certificate would be sent. On 27<sup>th</sup> November SM wrote to the claimant asking him to make contact to discuss his continuing absence but the claimant did not receive this letter because he had changed address and had not provided his new address to the respondent. By this time the respondent had received the claimant's medical certificate(s).

It was the claimant's evidence that he telephoned Head Office on 15<sup>th</sup> December 2006 enquiring about Christmas vouchers and the recruitment manager told him that his employment had been terminated because medical certificates had not been received for two or three weeks. He told her that medical certificates had been submitted. He then telephoned SM and told him that he was dismissed and SM told him that that it was his "tough luck", that he had not been complying with the rules and that he should have been keeping regular telephone contact. SM confirmed to him that he had received the certificates and sent them to Head Office. According to SM the claimant did not tell him that he had been dismissed. It was he (SM) who had suggested to the claimant to call Head Office about the vouchers. The recruitment manager denied telling the claimant that his employment had been terminated. She advised him to contact SM about the vouchers and he agreed to do that. SM further told the Tribunal that the decision to dismiss is his. The claimant continued to send medical certificates to the respondent until early to mid January 2007.

Following his dismissal the claimant went to his solicitor who wrote to SM on 19<sup>th</sup> December calling on the respondent to immediately reinstate the claimant and gave the respondent until 4.00 p.m. on Friday 5<sup>th</sup> January, (2007) to reply. In the letter she informed the respondent that the

claimant's recent absence was due to depression caused by bullying in the workplace. This letter was copied to the Personnel Department in Dublin. It was the Recruitment Manager's evidence that she did not see this letter until the first day of the hearing because she was in Scotland. No response was received to the letter. On 12<sup>th</sup> January 2007 the claimant's solicitor again wrote to the respondent stating that since the respondent had neither seen fit to deal with the situation nor to reply to her letter they were taking it that the claimant's position "stands terminated". Due to the respondent's failure to reply to his solicitor's letters the claimant sought alternative employment.

SM received the solicitor's letter of 19<sup>th</sup> December on 22<sup>nd</sup> December. This letter was the first indication he had of the claimant's alleged dismissal. He telephoned RM and Head Office but as there was nobody in the office he faxed the letter through. Because Christmas is a busy season and he was on a week's holidays in early January SM did not respond to the claimant's solicitor's letters until 19<sup>th</sup> January 2007. In his letter SM denied that the claimant's employment had been terminated and indicated that the respondent was awaiting the claimant's return to work when certified fit. On 9<sup>th</sup> February 2007 the claimant's solicitor wrote to SM informing him that the claimant had obtained alternative employment.

### **Determination**

Dismissal was in dispute in this case. The Tribunal accepts that the recruitment manager informed the claimant on 15<sup>th</sup> December that his employment with the respondent was terminated and that he relayed this to the store manager (SM) shortly afterwards that day. In her letter of 19<sup>th</sup> December to the respondent the claimant's solicitor referred to his dismissal seeking the claimant's reinstatement and gave until 5<sup>th</sup> January 2007 to reply. The store manager received this letter on 22<sup>nd</sup> December 2006 but took no steps to contact the claimant or his solicitor either then or immediately after Christmas. The Tribunal finds that ample opportunity was given to the respondent to rescind its decision to dismiss the claimant both before and after Christmas. In the circumstances it was reasonable for the claimant to seek alternative employment. The store manager's denial of the dismissal in his letter of 19<sup>th</sup> January 2007, in reply to the letter of 12<sup>th</sup> January from the claimant's solicitor, was too late to afford the parties an opportunity to mend the relationship. As there were no grounds to justify the dismissal the Tribunal finds that the dismissal was unfair and the claim succeeds. The Tribunal awards the claimant the sum of €18,000 under the Unfair Dismissals Acts, 1977 to 2007.

No award is being made under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 as the claimant was not available for work. The claim under the Organisation of Working Time Acts 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

