

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
- *claimant*

WT243/2010

CASE NO.
RP784/2010
UD589/2010

MN526/2010

Against

EMPLOYER – *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

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

Members: Ms M. Sweeney
Mr. D. McEvoy

heard this claim at Cork on 6th April 2011

Representation:

Claimant(s) : In person

Respondent(s) : Ms Rachel O'Flynn B.L.
Instructed by : Padraig Sheehan, Padraig J Sheehan Solicitors, Village
Green House, Douglas West, Douglas, Co Cork

The determination of the Tribunal was as follows:-

The claims under the Organisation of Working Time Act 1997, Redundancy Payments Acts, 1967 to 2007 and Minimum Notice and Terms of Employment Acts, 1973 to 2005 were withdrawn at the outset of the hearing.

As this was a case of constructive dismissal the onus of proof to show that the dismissal was unfair lay on the claimant.

Summary of the Evidence

The claimant commenced employment with the respondent in October 2005. His main duty was doing bread deliveries. The parties enjoyed a good relationship over the first few years of the employment; the claimant who had better English than the other Polish workers often acted as translator for them. The claimant maintained that the respondent's attitude changed in 2007.

In September 2009 the claimant fell ill and spent some time in the cardiac unit of local hospital. His position was that on his release from hospital the respondent did not return his phone calls. When they met, the claimant explained that while he could work normal hours he could no longer work longer hours. The respondent requested a doctor's certificate confirming that the claimant was fit for work.

The claimant's position was that at the respondent's request he met him on his return from his bread run on 13th October 2009 and the respondent informed him that he was cutting the workforce by around three within 2–6 weeks and that he would be let go unless circumstances changed. The claimant understood the situation and asked that he be given two weeks' notice. The respondent's position was that on 13 October it was the claimant who had raised the issue of redundancies and that he had told him that jobs could not be guaranteed. The only employee who has resigned since then has been replaced.

The claimant's position was that he had been rostered to work on Monday 26 October 2009, the October bank holiday, but he wanted the day off for personal reasons and it was agreed that, if he could get cover for his bread run he could have the day off. The claimant got cover. However on Saturday 24 October 2009 when he returned from his normal bread run the office employee asked him to do a shorter bread run on 26 October and he refused as he needed to go to Dublin. The respondent arrived on the scene and he was aggressive and used bad language. He told the claimant that if he would not do the shorter bread run on Monday there would be no job for him. Both parties were threatening to phone the guards. The respondent pulled his mobile phone from him, and he felt unsafe. He wanted to leave but the respondent stood in the doorway and told him that he could only leave when he told him to. The respondent continued to roar at him but when the office employee advised him to allow him to leave, the respondent calmed down and the claimant left the office. Once outside the office he asked for his wages and the respondent told him if he did not work on Monday there would be no wages. He reminded the respondent that he had the bread money. He gave it to the office employee and left. The claimant was extremely shaken and his neighbour advised to go to the gardai. He was so emotional a garda advised him to go to a solicitor, which he did. He had needed the Monday off to prepare his C.V. as the respondent had informed him that he would have no job for him in 2–6 weeks. He did not make a formal statement to the gardai.

The respondent's position was that on the Saturday prior to 24 October the claimant had agreed to do a shorter run on the bank holiday. On Saturday 24 October his office employee told him that the claimant was refusing to do the shorter run on the bank holiday. He then spoke with the claimant, who reiterated his refusal to work on Monday. He reminded the claimant that they had previously discussed the matter and that he could not change at such short notice. He instructed the claimant to work on Monday. When he returned to his office he heard shouting and a scuffle and returned to find the office employee holding his arm. The office employee told him the claimant had crushed

him against the door. The employee was very shaken and as he was on dialysis his arm was his lifeline. He invited the claimant to his office to get him away from the situation. As the claimant pushed past him on the concrete path the respondent stumbled and in trying to steady himself he caught on to the claimant causing his mobile phone to fall to the ground. The claimant shouted something in Polish and said, "I'll f.....g kill you" and left. That was the last he saw of the claimant

The office employee confirmed in his evidence that the claimant was aggressive and shouting in the office, that he had pushed him against the door crushing his arm and that he did not want to do the shorter run on the bank holiday because he had an interview in Dublin about a photography course.

The respondent contacted the gardai but he did not make a statement. The respondent had tried to telephone the claimant but his phone was always off. He called to his door and got no reply. He felt bad that something like this could have happened and had always treated the claimant with respect. He had asked a Polish person to try to find out what was happening. There was no contact until the respondent heard from the claimant's solicitor. He did not have the claimant's mobile phone. He had not blocked the claimant's passage through the doorway. He had not dismissed the claimant.

Determination:

It was common case that an incident occurred between the parties on 24th October 2009. There was a clear conflict of evidence as to what transpired between the parties on that day. As this is a claim for constructive dismissal the onus of proof rests on the employee to show that because of the conduct of the employer he was entitled or it was reasonable for him to terminate his contract of employment with the respondent. The claimant failed to show on the balance of probability that his was the true version of the incident that occurred on 24th October. Accordingly, he failed to discharge the onus of proof under the Act. For this reason the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

