

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Case No.

Employee

UD331/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr. D. Moore
Ms. E. Brezina

heard this claim at Naas on 11 July 2008

Representation:

Claimant:

Ms. Alison De Bruir, instructed by Ms. Sarah Coughlan,
Peter Flanagan & Co. Solicitors, The Square, Kildare

Respondent:

Mr. Cormac O'Ceallaigh, Sean O'Ceallaigh & Co. Solicitors,
The Old Bank, Phibsboro, Dublin 7

The determination of the Tribunal was as follows: -

This was a claim of constructive dismissal in which it fell to the claimant to make his case.

The claimant was employed as a furniture removal driver from November 2005 as part of a two, or more usually, a three-person team. He had some five years' experience of this type of work from a previous employment. The employment was uneventful until May 2007, at around 9-00am on 27 May 2007 the claimant fell between the back of his truck and the loading bay of a company with whom the respondent had a warehousing contract. The warehouse contractors informed the operations manager (OM), who in turn notified the managing director (MD). The claimant was taken, by ambulance, to a hospital casualty department where his injuries were treated. The claimant was home by around 3-30pm on the same day. He was off work as a result of his injuries for some six weeks. His wages were paid in full throughout this period. OM went to see the claimant when he was in hospital and there was no discussion about a claim form concerning his injuries. MD attempted, unsuccessfully, to phone the claimant when he was in hospital. The respondent's position is that MD then spoke to the claimant's son (CS), also an employee of the

respondent, who was with the claimant in hospital and CS had asked him for a claim form for his father. The claimant's position is that he asked for an accident report form.

There was discussion between the claimant and MD about whether or not the claimant was to pursue a personal injury claim. The claimant's position is that MD was trying to persuade him not to take such a course of action, the respondent's position is that MD told the claimant to get himself back in order and that then they could talk about the situation. He had told the claimant that he had the right to sue if he wanted to; the claimant's reply had been along the lines of "If I don't claim for this when can I claim?"

At the beginning of August 2007 the respondent received a letter from their insurers to the effect that the claimant was taking a personal injury claim. On 2 August 2007 OM sent an email to their insurer to confirm that, "we have spoken to the claimant and he has advised us that he is not proceeding with this claim". The respondent's position is that this was on foot of a conversation between OM and the claimant. The claimant's position is that he gave no such advice to MD but did accept having spoken to MD about the potential claim. On 9 August 2007 the claimant's solicitor wrote to the respondent to confirm that they had received instructions from the claimant to pursue a personal injury claim on his behalf. The respondent's position is that they never received this letter. The claim was lodged with PIAB on 3 September 2007. On 14 November 2007 the respondent received a letter from PIAB regarding the claim. On 14 November 2007 MD sent a letter to PIAB, which stated, "On having a conversation with the claimant today, he has confirmed that he will not be pursuing with this claim and we have now closed the matter on our side." Both MD and OM testified that they were present when the claimant agreed to this letter. The claimant's position is that, whilst the conversation took place, he did not authorise the letter being sent. On 16 November 2007 the claimant's solicitor wrote to both the respondent and PIAB to confirm that the claim was still being pursued. On 28 November 2007 MD wrote to the claimant's solicitor acknowledging the letter of 16 November 2007 and confirming that their insurers had been informed.

On 12 December 2007 the claimant received a written warning from OM after informing his two colleagues the previous day that he would not be in work on 12 December because he had "A hard day's work." This written warning referred to three previous verbal warnings on 14 May, 11 October and 3 December 2007. The claimant denied any knowledge of the first two. He accepted there had been a complaint against him on 3 December 2007 but denied its veracity. The claimant's position is that MD was continually harassing him in regard to the personal injury claim such that his working conditions became intolerable. He was also unhappy about being required to take annual leave on days when there was no work. The respondent's position is that the claimant at all times had agreed to this arrangement and had arranged to mitigate his position in regard to annual leave by working extra days when on overseas trips. On 15 February 2007 after completing three jobs the claimant resigned and went home after being asked by OM to wash the company vehicles. His position is that this was at around 5-00pm, the respondent's position is that this was at around 3-00pm and was because the claimant was in MD's auction room and in bad humour and OM wanted him out of there because there was a customer in the auction room.

Determination

The central part of this case is that the claimant asserted that he was subject to a campaign by MD to persuade him to withdraw his personal injury claim. The claimant raised other issues regarding his being forced to take holidays on those days when there was insufficient work for him and also being given too much work to do, indeed this was the issue that prompted his resignation on 15 February 2007, some two months after the last alleged incident in the personal injury matter. The Tribunal is not satisfied that MD did engage in a campaign to get the claimant to withdraw the personal injury claim. Neither is the Tribunal is satisfied that the claimant was disadvantaged by the holiday matter, rather it seems he was being facilitated by being allowed to mitigate the loss of holidays due to lack of work by his working pattern when on overseas trips. For these reasons the Tribunal finds that the claimant has not met the onus of proof required in a claim of constructive dismissal. It follows that the claim under the Unfair Dismissals Acts, 1977 to 2001 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)