

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
Employee

**CASE NO.**  
UD542/2007

against  
2 Employers

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr S. Ó Riordain BL

Members: Mr. J. O'Neill  
Mr. S. O'Donnell

heard this claim at Dublin on 4th October 2007  
and 13th December 2007  
and 14th December 2007

Representation:

Claimant(s) : Mr. Cathal McGreal BL instructed by:  
Anne Fitzgibbon, Fitzgibbon & Company, Solicitors, The Penthouse,  
121-122 Capel Street, Dublin 1

Respondent(s) : Mr. Niall Beirne BL instructed by:  
Mr. Paul Glenfield, Matheson Ormsby Prentice, 70 Sir John Rogerson's Quay,  
Dublin 2

The determination of the Tribunal was as follows:-

#### **Claimant's Case:**

On the **second** day of the hearing the claimant gave evidence. He stated that he commenced employment with the respondent in 2003 as an Installation Technician. He was later promoted to Construction Manager. His responsibility was to design and oversee the building and ensure quality control of communications equipment on broadcast sites for the respondent. He was PSDS for the company – Project Supervisor Design Stage. He explained that the management structure had changed frequently. When he commenced employment there were 18 staff. When he left there were over 200. At first it was a small close knit company, the CEO (Chief Executive Officer) often worked on the roof with them. A new person was hired as Network Operations Manager in November 2005. Another member of staff left and the claimant performed his job reporting to the Network Operations Manager.

Two people had built up the company and were Joint Managing Directors. The staff were called to a meeting and were informed that the company was to be sold. A new member of staff was hired and appointed Chief Executive Officer. He was experienced in floating companies on the stock market. A further new member of staff was employed as a Technical Manager and a National Operations Centre Manager was appointed in November 2006. One of the former Joint Managing Directors remained with the company as a Non Executive Director.

The claimant signed a contract with the company in 2003 but was not given a grievance procedure. He was informed that the grievance procedure was subsequently available on the respondent's intranet. He believed that he may have signed for but did not read the grievance procedure. When asked, he said that he did not recognise and had not read the grievance procedure produced at the hearing. When asked, he stated that he did remember three or four meetings with the HR Consultant before he left the company in December 2006 but he did not recall seeing the grievance procedure.

Originally the claimant loved working with the company and he had no difficulty balancing work and family life. In 2004 he had some family problems - his child was born 6 weeks premature - but it did not affect his working life. He was incredibly busy and there was no pressure he couldn't deal with.

In November 2005 he was introduced to the recently appointed Network Operations Manager (NC) to whom he reported and whose older brother he had knocked around with. Things were ok initially and the claimant spent some weeks in introducing him to the company operation. The problems then commenced. The Network Operations Manager removed his "signing off" authority - this was supposed to be temporary but it stayed like that. The claimant at the time was pretty much responsible for a large budget involved in roll out and builds. The claimant said that he was responsible for the installation department (domestic installations) with 25 to 30 employees and for the construction department but "he gave away" the installation department because of the workload.

The claimant said that the Network Operations Director decided to get rid of the existing 30 -40 contractors used by the respondent and bring in one new electrical contractor. He spoke to the Network Operations Manager and queried the experience of the new contractor G on the basis of their lack of experience in broadband technology and high-rise operations. He told the Network Operations Director that, as PSDS, he was concerned from a health and safety point of view. He also told other colleagues of his concerns. The new company G was only involved in domestic installation work at the time. He also raised his concerns with colleagues and with the JN.

By Spring 2006 many of the previous contractors were gone and he was very upset from a health and safety perspective and he was afraid that someone would fall off a roof. He spoke to one of the original owners (JN) [originally a Joint Managing Director and later a Non Executive Director] about his concerns of the inexperienced contractors. It was not a formal meeting. He had an informal relationship with JN and trusted him. The claimant got very upset and cried at the meeting. He told JN it was "an accident waiting to happen". He felt the respondent just wanted to do the work at a cheaper rate. He told the Tribunal of an incident in his previous employment where an employee nearly died. He understood that JN would take the matter up with the Board and with the CEO.

The claimant said that his ongoing working conditions got worse. The Network Operations Director spoke over his head to others and barely spoke to him. Their relationship soured and the

Network Operations Director felt he was contradicting his authority in relation to the choice of contractor. He explained that the Network Operations Director was his supervisor but that he could not take his instructions if he believed it was risking people's health and safety.

Weeks went by and the Network Operations Director did not speak to him. For seven weeks the Network Operations Director did not speak to him at all and turned his head away in front of other people when they would pass in the corridor. He regarded it as "absolute lunacy". It was a ridiculous situation and something would have to be done. He couldn't continue to work in that environment.

The claimant approached the CEO informally and told him. The CEO shrugged his shoulders and asked what he wanted him to do. Neither HR nor the grievance procedures were mentioned. After discussion the claimant told the CEO he would sort it himself. He approached the Network Operations Director and discussed the matter with him. He told the Tribunal that he thought Network Director had apologised. This happened around the Summer of 2006. The claimant told the Tribunal that he had kept a diary of events at the time; it had started as a joke. He had not been able to get the diary. The Network Operations Director was now civil to him and the claimant thought the matter was sorted. However, he was never allowed to sign off again and everything he did had to go through the Network Operations Director.

From January to March the situation was getting worse week by week and the matter came to a head in Summer 2006. The Network Operations Manager engaged the new contractors G for high site construction. The claimant objected as the contractors had no experience in lifting heavy steel or training or certification to carry out the work. As PSDS he did not believe G were competent. The Net Director told him that "any monkey can put a piece of steel on a roof". The new Technical Manager was brought in on the work. The claimant said that he had been very concerned as he felt the Technical Manager, who had come from Australia, was not experienced. He went to Health and Safety Officer to see if the contractor G had the appropriate certification for broadband and high site work. He was informed that he would have to ask the Network Operations Director. He again approached one of the original owners, now a Non Executive Director of the company with no day to day responsibility in the running of it. He said he would bring the matter up with the Board but the claimant told the Tribunal that he was not sure if he had done this. At this stage he thought his job was going. He had lost all responsibility and was worried sick. When asked, he said that he had been offered alternative employment but had not gone in search of the position with another company. During his employment with the respondents he had refused other offers of employment because he loved his job.

In November 2006 the Network Operations Director informed him that the contracting company G were to build the technical site in Dun Laoghaire. When he said that they were unsuitable he was told to "mind his own "f\*\*\*\*\*g" business and that they were being given the job anyway. When he asked about the tender process, he was informed that G would get all rooftop work in the future. He asked to see their method statement. 100 kilos of steel was to be lifted and there was no mention of a crane. He was informed a fixed crane would be used from a site next door. The claimant stated that this was not normal procedure and that the Network Operations Manager was just trying to save money. In the past the street would be closed and a crane brought in to lift the steel.

On November 21<sup>st</sup> 2006 he received a call from the High Site Engineer (RC) telling him that the site was to be powered up. The claimant went to the site. Four Photographs of work on the site were produced to the Tribunal and the claimant explained various safety related problems which he said arose with the installations. These related to earthing of equipment,

attenuae height, weatherproofing and waterproofing of cables. The claimant stated that he took 53 pictures and found 26 faults, 5 of which were very serious. The claimant explained that if a company had made five faults in the past, he would never use them again. He drove back to the office very upset and distressed and told one of his colleagues, the former Chief Technical Officer (MS) what had occurred. He told him to tell the Network Operations Director. He also told MS that he had “nowhere to go from here”. The claimant said that he felt if anything had happened he would, as PSDS, be legally responsible for it.

He went on sick leave. He wrote a detailed email on November 22<sup>nd</sup> 2006 to the Executive Director and to the CEO with a list of his concerns about the site. When asked, he said that he had not negotiated new employment at that stage. He never returned to work after November 21<sup>st</sup> 2006. He was on certified sick leave. He went to his solicitor the following day as he wanted a letter from the respondent stating he had nothing to do with the site in Dun Laoghaire. He explained that he had signed off on the original designs for that site some months previously. He referred to the medical report of 18 October, 2007, which had been submitted to the Tribunal, confirming his work related stress.

He was contacted by the HR Consultant and, in all had four meetings with her. The CEO attended one meeting. They wanted him to take time off and file a bullying and harassment claim. Everybody was concerned with the effect of a family health scare on him but this was not the problem. It was too little too late to file a complaint. He couldn't go back. Everybody had been aware of the issues for months and they had not been addressed. He told them there were two options – one that the company would pay his bonus and keep his share options, the other that he would go to his solicitor. He packed up the job and his solicitor subsequently wrote to the company.

On cross-examination he said that there had been no HR department in 2004. When asked, he said that he had signed a document to state he had read the grievance procedure when it was put on the company intranet but had not read it. In the past problems had been sorted out amongst themselves. He stated that he had not chosen to ignore the grievance procedure and had hoped to resolve the problems at the time the Network Operations Director wouldn't speak to him. He told the Tribunal that he did not think it was bullying and harassment at the time but recognised it as such subsequently. He agreed that the CEO had asked him if it had all been sorted out between him and the Network Operations Director after he had reported his ignoring him. He said that he had been asked by the Network Operations Director to apply for another position in the company but had not pursued it. When asked, he said that he had approached the Health and Safety Officer with his concerns about using the company G. He said that when he had spoken to her about another site she had visited the site. When put to him he stated that his wife had problems with their second pregnancy in November 2006 but these were not the reason for his being stressed out.

When asked if he had been dismissed, he stated that he could not return to the job, as the site was unsafe. When put to him, he said it was the “best day” when he received the solicitor's letter to say he had nothing to do with the site. He attended several meetings with HR after he left. He expressed his concerns about the Dun Laoghaire site. The claimant told the Tribunal that he could not go on and felt his career was over. When asked, he stated that he had not asked for a payoff. He just wanted what he was entitled to. The possibility of another job being offered to him was raised in the meetings with HR.

When asked by the Tribunal he explained that his job as PSDS was to go to a site and design and build it if feasible. The job was put out to tender and when selected and the job was performed, he would then inspect it. When put to him, he stated that he was the competent person to sign off on

site work. When asked, he stated that the tower crane used on the Dun Laoghaire site would not have been able to reach across to the respondent's site. He listed some of the concerns he had about the site. Wiring exposed, cable trays simply bolted down, antenna too near people's access and other companies equipment being used in earthing. There were also a lot of rigging issues.

When asked about his claim for bullying and harassment, he stated that he had not realised he was being bullied until he had explained the situation to friends in November 2006. When asked, he stated that he had checked if the company G had been RECI certified.

The claimant was re-examined on the evidence given in relation to his photographs on the third day of the hearing. In relation to the photo of the cable tray, he stated that the two trays, the respondent's and another operator, were joined together. When asked if this was unsafe, he stated that all systems should be separate, it could melt if lightening struck.

When put to him that the Technical Manager had stated that he had not seen him in the office, he replied that he had been in the office up until November 21<sup>st</sup> 2006. The Technical Manager was located only 12 feet away from him. He stated that he had rung the network section on November 22<sup>nd</sup> 2006 and was informed the site was live. He also stated that the site must have been live as the completion document was compiled.

He stated that he had made complaints over a period of nine months. When asked, he said that in relation to the missing tiles and the exposed upturned cable he stated was liable to flooding if it rained, he said that the cable was positioned across and then downwards, not upwards. He said that he was not aware another operator had removed the tiles. When put to him that it would have been unfair of the respondent to force him to work with the company G, he replied that he had refused to work with them and when he refused they got some one else but he said that he had never been given a piece of paper to say he was not PSDS on the Dun Laoghaire site.

### **Respondent's Case:**

A colleague of the claimant gave evidence (known as MW). He stated that he had been the claimant's boss shortly before he left. He had had a performance appraisal meeting with the claimant at which he had raised salary matters and the need to develop processes.

He had attended an ESB course on November 21<sup>st</sup> 2006. He received a call from the claimant informing him that the claimant's wife was unwell that day, he also mentioned bullying and harassment and said he was going on sick leave. The witness stated that he had initially visited the Dun Laoghaire site and had sent a crew out to look at the re-design of it. The job had gone out to tender and the company G had acquired it. On the day in question the site had been in the middle of the snag list process. All sites were snagged before they were handed over. The Technical Manager found no faults with the site. The site was certified for handover by the Technical Manager on November 29<sup>th</sup> 2006. When asked about the other operators on site and the missing tiles in one of the pictures produced, the witness stated it was one of the other operator's works.

On cross-examination the witness stated that the Technical Manager had been hired by the respondent in 2006 and had 30 years experience in the business. When asked, he stated that the claimant did not want to be involved with the Dun Laoghaire site after it had been re-designed by the Technical Manager. He had had a meeting with the claimant and was told that he, the claimant, was washing his hands of it as the company G were carrying out the work. When asked, he stated that he did not have the notes from the appraisal/ informal chat he had had with the claimant. He

stated that the Technical Manager was PSDS on the Dun Laoghaire site. When asked, he said that he had not known the claimant had a Health and Safety issue with the contractor. He thought the issue was with the selection of the contractor.

He said that the Dun Laoghaire site was not the first job the company G had performed for the respondent. He stated that G had sorted out the use of the crane beside the Dun Laoghaire site. When asked, he said he did not know if there had been a method statement for the Dun Laoghaire site. He did not know why the company G had been picked to perform the job. He stated that there was a risk assessment and health and safety statement since December 2006/January 2007. When asked, he said the snag list for the Dun Laoghaire site was drawn up on the week commencing November 21<sup>st</sup> 2006. He explained that it took a week between build to snag list. He stated that the site was not powered up on November 21<sup>st</sup> 2006.

When asked by the Tribunal he stated that he had not seen the claimant's report of the site. At the time the Technical Manager was already scheduled to visit the site and snag it. When asked, he stated that the original design was by the claimant but that it had been redesigned and the claimant had not been PSDS on site at the time.

On re-examination the witness stated that the claimant had decided not to be associated with the Dun Laoghaire site after the company G got the job.

The Health & Safety officer gave evidence. She explained that she carried out health and safety audits for the respondent.

She stated that the claimant had not approached her about the PSDS role. She explained that she had inspected the Dun Laoghaire site on two occasions and there had been no problems. When asked, she said that the claimant and herself had worked closely in the past. He would have invited her to look over sites and if there were any concerns recommendations were given. The witness said she had been happy with the standard of work from the company G.

The witness told the Tribunal that the claimant had contacted her while he was on sick leave to inform her he had left. When asked, she said that when new contractors were hired, an insurance certification and safety statement were required. The company G had this certification for the job in Dun Laoghaire.

On cross-examination she stated that she did not look for relevant certification when she visited a site. She stated that her role was to advise, check and report on sites. When asked, she stated that she was not a part of Human Resources. When asked by the Tribunal, the witness stated that she did not have any staff. She stated that if she found a site unsafe she would call a halt to it

The Human Resources consultant gave evidence on behalf of the respondent. She commenced employment with the respondent in March 2006 and overlapped with the last HR consultant. There were also two other staff employed there. She attended the premises twice a week.

The witness stated that she met with the claimant and a friend in Lucan on November 23<sup>rd</sup> 2006. She had viewed the claimant's email of the previous day and was aware of the health scare with the claimant's unborn child. The claimant had to leave the meeting on two occasions, as he was so upset. The claimant's friend questioned the witness on procedures. The claimant referred to the difficulties with the Network Operations Manager and to his health and safety responsibilities as PSDS and he mentioned the Dun Laoghaire site. He also mentioned a previous occasion in another job where a ladder had fallen. She encouraged him to take time out and to take

counselling and she explained the grievance procedure to him but he said that he could not continue to work. The claimant proposed two solutions to the witness, that he receive compensation covering his bonus and share options and a letter releasing him from any responsibility for sites or he would consult a solicitor. She subsequently reported to the CEO.

On November 27<sup>th</sup> 2006 she met the claimant alone. He was still very upset and was not really interested in counselling or in pursuing the grievance procedure. She encouraged the claimant to take time out and suggested to him that he was in the wrong frame of mind to take such an important decision as leaving the company. She asked if he wished to meet the CEO. The witness told the Tribunal that, although the claimant was unaware of other roles he might fill in the company, she undertook that the CEO and herself could explore other roles. The claimant saw no scope for this. She again reported back to the CEO.

She again met the claimant on December 4<sup>th</sup> 2006. The claimant had his mind up that he was leaving the company. She tried to dissuade him and he asked to meet with the CEO. She told him that the CEO was supportive of him and valued him. She also assured him that there would be no adverse affects if he initiated a grievance procedure and he would be protected if he took a case.

On December 13<sup>th</sup> 2006 the final meeting was held and the witness, the CEO and the claimant met for a half hour. It was a friendly meeting. The CEO told him that they were there to help and they did not want him to leave. They told him that they would support him if he needed counselling. They suggested that he take time off until January and they pointed out that there would be other pressures if he went to a new job. The claimant was resolute to leave and informed them that he had a letter of resignation in his car and would drop around with it later. A letter of resignation was received from his solicitor on 19 December, 2006 – letter dated 18 December. Notes of the HR meetings with the claimant were submitted to the Tribunal.

Copies of correspondence between the claimant and respondent solicitors were given to the Tribunal. The letter dated 18 December alleges constructive dismissal on or about 3 December 2006 and seeks money outstanding and compensation including value for the claimant's shares. The letter also advised the company that the claimant would have no further liability for projects designed by him as the company was in breach of health and safety legislation in potentially using non-competent and/or non certified contractors. The constructive dismissal was denied by the respondent company's solicitor in a reply of 22 December, 2006. The letter also indicated and the company wished, inter alia, to reassure the (claimant) that his grievances would be fully and properly dealt with through the grievance procedure and that he would not suffer any victimisation for bringing complaints concerning his treatment. The letter also indicated that the claimant was a valuable member of the team and that the company was prepared to support the (claimant) in any way it reasonably could to overcome his current difficulties and secure his return to work

On cross-examination the HR Consultant said that she was unaware that he had spoken to the CEO previously. She had only heard of the claimant when she had received a call on November 22<sup>nd</sup> 2006. When asked, the witness stated that there had been no induction course when the claimant had first commenced employment with the respondent. When asked, she said that she had not told the claimant that the respondent would give a letter to him to dissociate him from the Dun Laoghaire site. She said that she had been concerned about the claimant's frame of mind in taking any important decision and had recommended counselling and waiting until he was in a better frame of mind. She said that he had alleged bullying issues with the Net Operations Director and concern with the tendering process in relation to G and with health and safety. There had been a lot of innuendo but no facts about the tendering process. She said that she had not given the claimant a copy of the grievance procedures but that he had previously been requested

to read and to acknowledge this and he had signed. She said that she and Irish Broadband had been looking for a solution. He was not disposed to initiate a claim under the grievance procedure and he was determined to leave. In the circumstance, she did not explore whether another role could be found for him.

On the **third** day of the hearing the Technical Manager gave evidence on behalf of the respondent. He explained that he had 35 years experience in the industry and had moved from Australia to Ireland in November 2005. He joined the respondent company around Easter time 2006. He told the Tribunal that he had received a copy of the health and safety procedures and had signed for it. He explained that the level of health and safety procedures were lower in Ireland than they were in Australia and brought this matter up with the Health and Safety Officer.

The witness stated that he was not responsible for the tender process on the Dun Laoghaire site. He explained that the job had been delayed but this was normal. He explained he became involved in the Dun Laoghaire site in September 2006. The claimant was on leave at the time. The job was surveyed on September 8<sup>th</sup> 2006. The Network Operations Manager asked him to review the installation and he was PSDS for the site. This was the first occasion on which the claimant was made aware that he was no longer PSDS for Dun Laoghaire and he had not received any written notification of this. The witness said that the claimant could not be surprised given that he had asked not to work with G.

Original and revised plans for the Dun Laoghaire site were submitted to the Tribunal. When asked, he said that he felt the claimant's original draft plan had not been a very professional draft. There were no heights on the drafts; antennae could be walked in front of which was very hazardous. He accepted that the claimant's original design was an initial one.

He explained the changes made from the claimant's to his design. A cabinet was relocated to a safer position in his design. It was easier to install it in that position and was a more practical make of cabinet. It was also a greater distance from the antennae. He explained that the manufacturer recommended the height the antennae were placed which he had adhered to in his revised plan.

The company's G's Health and Safety Statement was submitted to the Tribunal and also the Method Statement (including Risk Assessment) for the Dun Laoghaire site. He also submitted a ESCCA certification in respect of G and he indicated that he had confirmed their high site certification and he was satisfied that they did safe work. When asked about the issue of the crane, the witness said that it was stated in the Method Statement under manual handling. When suggested that the two documents were not site-specific documents, he replied that they were generic. The Site Completion Form and As Build Document submitted by the contractor were produced. He explained that the Site Completion Form would be completed when the site was snagged. The witness said that he had never met the claimant on-site and had no meetings with the claimant concerning the job after the initial meeting with the Network Director at which the claimant objected to G. In response to questions, he indicated that he had taken the G documentation from his computer and did not have signed copies as he was called to give evidence at short notice.

The claimant's photographs were put to the witness to explain the hazards and he said that the claimant's photographs taken on November 21<sup>st</sup> had all been pre-snag which took place on November 25<sup>th</sup> 2006. There was a detailed discussion on the issues raised by the claimant in relation to the photographs and he refuted claims that the photographs indicated that the site was unsafe. Specifically, He was satisfied that the antennae height was safe: tiles had been replaced and cables were not exposed to the weather. Any issues outstanding were sorted in the



snagging process.

When asked for a copy of the snag list, he replied that it would have been screwed up and thrown away after the snags were rectified. It took one week to complete the job. When asked, he stated that he had not been present on the day the crane had been used but said that he had suggested to use the site crane and a smaller crane to put the cabinet in place. It was safer to use the crane in place and transfer the load over a non public space, also lifting a smaller crane to complete the placement, rather than try to bring another crane in. When put to him he stated that it had been the safest way to place the cabinet and there was no public access where it had been lifted. .

When put to him, he stated that he thought the site was ready to go in mid December 2006. When asked, he said that he had been told about the claimant's email of his concerns for the site but had not seen the photographs. When put to him, he said that the claimant had not been involved in anything he had done on the site and he had not seen him in the office. He also said that the High Site Engineer who had contacted the claimant was not qualified to confirm that the site was being brought to operational state.

The Chief Executive Officer (NP) gave evidence on behalf of the respondent. He explained that he had been appointed to the position in February 2006. JN a former Director and owner of the company and was still on site and the witness said that he had gone to him from time to time for advice on technical, operational and people issues.

He explained that he had not originally known the claimant, who was an employee since the company was set up but had met him informally a couple of times. He understood that working relations between the claimant and the Network Director were not good. There were issues between them on pay, allegations against the Network Director and appointment of G as subcontractors and when the claimant came to his office he told him that the Network Operations Manager was ignoring him. He asked the claimant what he wanted him to do. He said that he could talk to the Network Director, he could talk to both of them or the claimant could himself talk to the Network Director. The claimant thought it best that he sort it out himself. He later had a conversation with the claimant and it seemed the issue had been sorted. Both were talking in July and he thought that, by August, they were happy enough to continue with a workable relationship.

The witness stated that he had been surprised to receive the email from the claimant on 22 November, 2006. He spoke to the Executive Director about it and he forwarded a copy to the Network Director, MW and the HR consultant. He insisted the site be viewed. He said that the claimant was regarded by management as a "doer" but that documentation and administration were not his strong points. He was loyal but difficult to manage.

The witness said that the HR consultant was to make contact with the claimant. On November 24<sup>th</sup> 2006 he emailed the claimant, as he wanted him to speak to the HR consultant. The witness said that he was aware of the problems with the claimant's wife's pregnancy. The witness said that he could not understand, if the claimant was on sick leave, why he was speaking to some of the other staff. He was keen to get details of the 29 issues mentioned in the claimant's email and he indicated, in his email of 24 November, 2006 to the claimant that, when he felt able, his first task should be to complete his outstanding report to MW which would detail his concerns in respect of the Dun Laoghaire site which they could then address, together with the other matters which he had raised, in an appropriate manner.

The HR consultant met with the claimant and reported back to the witness. It seemed the claimant was "putting up obstacles" about returning to work. He met with the claimant on December 13<sup>th</sup>

2006. The claimant did not want to return to work and said that he could no longer work with the Network Operations Manager. He was looking for a cheque to walk away from the company. The witness said that he had told the claimant to relax and think about the matter over Christmas. The witness said that the claimant had been a good employee and very committed.

On cross-examination the witness said the claimant had been committed but was a challenging employee, administration was not his strong point. When the organisation chart was produced to the witness, he stated that the Non Executive Director was not a member of management. He believed, however, that the Non Executive Director, to whom the claimant had spoken a number of times, was well able to manage the relationship with the claimant. When asked if he himself was qualified in HR, he indicated that his background was in accountancy.

When asked if he had an input into the choice of who got a stock option, he replied that the selection had been determined in 2005 before he had arrived in the respondent company and it reflected the fact that the claimant was a committed long service member of the management team. The stock option was a reward for service and an invitation to stay in the company. He said that the claimant and the Network Operations Manager were having difficulties but that there had not been a formal grievance. He said that, when the claimant told him of his problem with the Network Operations Director, he gave him a number of options. He would speak to the Network Operations Manager, He could speak to both or the claimant could speak to the Network Operations Manager. It was the claimant's choice which option was used.

When put to him, he said that the claimant was unhappy that the contractors he had used in the past had not been hired for the job. He said that the selection of G resulted from a review of sub contractors with a view to reducing costs and increasing standards and it resulted in increased cost effectiveness and reduced failure rate. G was now one of three principal contractors and the company was satisfied with G from a health and safety perspective.

The witness said that he had not been told the claimant had been in tears when he originally met with JN. It was before he was hired. He said that the claimant's photographs of November 21<sup>st</sup> did not seem to be attached to his email of the following day. The alleged health and safety issues had not been documented. When asked if he was asked to remove the claimant's name from the DunLaoghaire designs, he replied that the claimant had not been the PSDS on-site. The claimant had requested not to be associated as G was the contractor. The Network Operations Manager had agreed. The claimant had subsequently attended the site without telling anyone. Under normal procedures he should have informed the Network Operations Director before going on site. When asked, he said that the company now had three PSDS's.

On re-examination he stated that, if anything had had happened on-site, the claimant would not have been personally liable as the respondent had insurance. When asked by the Tribunal, he stated that the site went live in the first week in December 2006. He again stated that the site had not been operational when the claimant had taken his photographs on November 21<sup>st</sup> 2006.

Counsels for the claimant and respondents summarised their clients' respective cases and these are referred to in the determination.

It was agreed, on conclusion of the hearing, that the Tribunal would firstly consider the question of whether the claimant had been unfairly dismissed and that the Tribunal would proceed to consider the claim for redress in the event that the claim was upheld. The redress being sought is compensation.

## **Determination**

The claimant is alleging that he was unfairly dismissed by the respondent company and the burden of proof, therefore, rests with the claimant to establish that his resignation was not voluntary and that his circumstances fell within the ambit of section 1 of the Unfair Dismissals Act 1977 which defines constructive dismissal in the following terms:

“the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer”

It is important to note in this regard that Section 27 (4) of the Safety, Health and Welfare at Work Act, 2005 provides that the dismissal of an employee shall be deemed, for the purposes of the Unfair Dismissals Acts, 1977 to 2001, to be an unfair dismissal if it results wholly or mainly from penalisation as defined in subsection (2) (a) of section 27 of the Act.

Section 27 of the Safety, Health and Welfare at Work Act, 2005 is in the following terms:

“(1) In this section “penalisation” includes any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.

(2) Without prejudice to the subsection (1), penalisation includes –

- (a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts, 1977 to 2001), or the threat of suspension, lay-off or dismissal.
- (b) demotion or loss of opportunity for promotion,
- (c) transfer of duties, change in location of place of work, reduction in wages or change in working hours,
- (d) imposition of any discipline, reprimand or other penalty (including a financial penalty), and
- (e) coercion or intimidation.

(3) An employer shall not penalise or threaten penalisation against an employee for–

- (a) acting in compliance with the relevant statutory provisions,
- (b) performing any duty or exercising any right under the relevant statutory provisions,
- (c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work,

- (d) giving evidence in proceedings in respect of the enforcement of the relevant statutory provisions,
- (e) being a safety representative or an employee designated under section 11 or appointed under section 18 to perform functions under this Act, or
- (f) subject to subsection (6), in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, leaving (or proposing to leave) or, while the danger persisted, refusing to return to his or her place of work, or taking (or proposing to take) appropriate steps to protect himself or herself or other persons from the danger.

(4) The dismissal of an employee shall be deemed, for the purposes of the Unfair Dismissals Acts, 1977 to 2001, to be an unfair dismissal if it results wholly or mainly from penalisation as referred to in subsection (2)(a).

(5) If penalisation of an employee, in contravention of subsection (3), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2001, relief may not be granted to the employee in respect of that penalisation both under this Part and under those Acts.

(6) For the purposes of subsection (3)(f), in determining whether the steps which an employee took (or proposed to take) were appropriate, account shall be taken of all the circumstances and the means and advice available to him or her at the relevant time.

(7) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (3)(f), the employee shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he or she took (or proposed to take) that a reasonable employer might have dismissed him or her for taking (or proposing to take) them.

The case was heard by the Tribunal over two and a half days. The claimant gave evidence on his own behalf and evidence on behalf of the respondent was given by the Technical Manager (TLR) by the National Operations Centre Manager (MW) who was the claimant's immediate superior since 1 November, 2006, the Health and Safety Officer (HP), the company HR Consultant (POD) and by the CEO (NP). The Network Operations Director (NC) who allegedly undermined and bullied the complainant and ignored his health and safety concerns was not subpoenaed by the claimant or called as a witness by the respondent who said that allegations against him should properly have been addressed within the company's grievance or bullying procedures. The Non Executive Director (JN), to whom the claimant originally conveyed his concerns, and who had some ongoing contact in this regard with the claimant and with the CEO, was not called to give evidence or subpoenaed by either side. A medical report, dated 18 October 2007, was submitted on behalf of the claimant indicating in summary that he been agitated and distressed and needed a short period of anti-anxiety treatment, due pressure of work when he felt he had to leave his position in December 2006.

Counsel for the claimant summarised his client's case at the end of the hearing. The claimant alleged that his job was unilaterally changed, that mutual trust and confidence essential to the contract was breached by the respondent, that there was an absence of managerial support for him, that, in particular, his legitimate concerns about health and safety matters from his perspective of Project Supervisor Design Stage (PSDS) in relation to the selection of a principal contractor with the respondent company were ignored. The claimant indicated that his position as PSDS with the respondent company meant that he had statutory responsibilities under section 17 (2) of the Safety, Health and Welfare at Work Act, 2005 in relation to health and safety in design and construction and these were not recognised by the company. The respondent company had also failed to provide a safe environment and place of work for the claimant. Top management in the company had been fully aware of the claimant's ongoing concerns and grievances and had failed to properly address them.

The claimant alleges that all these matters combined leading to serious work related stress for him and that his position was undermined to such an extent by the respondent company that he had no reasonable alternative but to leave his employment without notice and, having already unsuccessfully raised matters at top level in the company, without availing of the company's formal grievance or bullying procedures.

The complainant also alleged that there were breaches by the respondent company of section 27 of the Safety, Health and Welfare at Work Act, 2005, which relates to the protection of workers from dismissal and penalisation, and that his constructive dismissal also arises in this regard. Section 27 (4) of the Act provides that the dismissal of an employee shall be deemed to be an unfair dismissal if it results wholly or mainly from penalisation as defined in subsection (2) (a) of section 27.

The respondent company denies these allegations and their Counsel also summarised his client's case at the end of the hearing. The respondents say that the claimant was a valued and respected employee who was included, along with a small number of other employees, in a share option scheme; that they reasonably believed that difficulties between the claimant and the Network Operations Director had been dealt with by the company; that there had been no penalisation whatsoever in relation to health and safety matters; that the claimant's concerns about health and safety matters relating to the company selected initially for domestic and later for high rise construction work were unjustified and that the claimant's responsibility in health and safety matters was discharged by his doing his own design work properly and he could not be held personally responsible for accidents outside his control on sites. The respondents denied that the claimant's position had been undermined or that he had been bullied and they pointed out that at no stage had he availed of the company grievance or bullying procedures.

The respondent company indicated that, when the claimant's concerns about work on the Dun Laoghaire site came to their attention on 22 November 2006 while the claimant was on stress related sick leave, following what initially was perceived as a serious family related health scare, they had done everything in their power in a series of four meetings with the company's HR Consultant, the final one of which was attended by the CEO, to persuade the claimant to avail of stress counselling and to put off taking a decision on his future until he was well again and to allow the matters raised by him to be fairly investigated under the company's grievance procedures.

They said that they told the claimant that they valued his contribution to the company and they did not want him to resign. They said that they had assured the claimant that he would in no way be penalised for initiating the grievance process and they were prepared to consider accommodating him in another job in the company if he was unwilling to continue in his present role. They indicated, however, that they could not agree to the claimant's request that he should receive a

termination settlement including a bonus and compensation for his employment related share options and, in the circumstances, the claimant's solicitor confirmed the claimant's resignation in writing by letter dated 18 December, 2006. The respondent indicated that, even at this stage, they were prepared to process a complaint under the grievance procedure if the claimant withdrew his resignation and they indicated in reply to the claimant's solicitor on 22 December, 2006 that they were still prepared to engage with the claimant with a view to dealing appropriately with his grievances and securing his return to work following the resolution of his stress related illness. The respondent said that the claimant had voluntarily resigned and that there was no question of constructive dismissal.

The Tribunal, on the basis of the evidence given, has considered the relationship between the claimant and the company since the claimant originally joined in 2003 and has, as best it can, summarised, in an integrated way, the key evidence with a view to arriving at an informed determination.

In the period from 2003 to 2005 the claimant was promoted from his initial position as Installation Technician to Construction Manager and Project Supervisor Design Stage (PSDS) with responsibility for design and oversight of quality control and building of the companies broadcasting sites and for domestic installations. He had a close working relationship with the Joint Managing Directors and was very happy to be making an important contribution to the ongoing growth and development of the company. It is clear on the evidence that the board decision in 2005 to include the claimant in the share option scheme was a reflection of the considerable contribution made by the claimant to the development of the business and their wish to retain his services with the company. There were no difficulties at this stage.

The company growth, however, necessitated change. The numbers of employees increased (from around 18 when he joined the company to over 200 when he left in December 2006). The focus was on greater financial control and better return on investment. A new CEO was appointed in February, 2006 and the top management structure was changed with a former Joint Managing Director taking an advisory position as a Non Executive Director. The CEO indicated that, in a board review of business operations designed to reduce costs and improve quality of service, a decision was taken to substantially reduce the numbers of subcontracting firms engaged in the construction of broadcasting sites and domestic installations from about forty five to ultimately three principal contractors. As the company grew, the HR function was developed; HR policies and codes were put on the companies intranet (the claimant signed a written acknowledgement but did not actually read the grievance procedure) and an experienced HR Consultant was engaged on a part time basis to oversee the operation and development of the HR policy.

The evidence indicates that the appointment of the Network Operations Director in November 2005 was the turning point. The claimant's authority to sign off on projects was removed. The claimant was concerned as PSDS that the replacement, as he saw it driven by financial considerations, of experienced subcontractors whom he knew to be competent would lead to health and safety problems. He believed that the selection by the Network Operations Director of G company was unsafe in that, in his view, G and their staff did not have the necessary experience or training in relation to broadband installations or operating at heights. It is also clear from the evidence that he felt that G had been selected by the Network Operations Director on the basis that he knew them rather than on the basis of their experience but he accepts that this is based on hearsay.

The evidence given by the claimant outlines the deteriorating relationship with the Network Operations Director and the extent to which the claimant's concerns on health and safety matters were not addressed. The claimant's evidence was that the Network Operations Director was

dismissive of these concerns and it is clear that the claimant's authority was being reduced. The claimant discussed his reservations informally with colleagues and he also spoke to the former Managing Director (later the Non Executive Director).

Matters subsequently got worse in the Spring of 2006 when the number of experienced contractors were substantially reduced and he outlined his concerns to the Non Executive Director whom he understood would talk to the CEO. He was afraid people would fall off a roof due to a breach of a duty of care and he was upset to the extent that he was crying when talking about this.

The claimant's evidence was that his working conditions were getting worse. The Network Operations Director was publicly ignoring him in the company and that after seven weeks he went informally to the CEO who, in effect, shrugged his shoulders and asked him what he wanted him to do. The claimant agreed to talk to the Network Operations Director himself and, while the Network Operations Director did apologise and matters improved for a time, his overall situation got worse and his position was being continuously undermined. He later realised that his treatment by the Network Operations Director constituted bullying. He could put up with the matter while the new contractors were dealing with domestic installations, an area of responsibility which the claimant had, to use his own words, "given away" because of the huge volume of work he had, but he feared that any engagement of G in high site construction would inevitably force his own resignation because of his concerns for health and safety.

The Tribunal considers that it should have been, and may well have been, clear to the company at this stage that the claimant was getting increasingly stressed about matters which were of considerable importance given in particular his position as PSDS and that the company had a duty of care to an experienced employee of the claimant's standing to take the matter in hands before it further escalated. The health and safety concerns and the extent of the claimant's legal responsibilities in this regard as PSDS should have been discussed and, if possible, resolved with the claimant.

On the other hand, it is also clear on the evidence that the matter is not one sided. The claimant was, on his own evidence, perhaps unduly emotional because of a near fatal accident previously to a colleague on a building site. The claimant chose to pursue his concerns informally with JN who was moving to an advisory rather than an executive capacity in the company. It is also clear on the evidence that the CEO, when approached informally, tried to manage the situation by giving the claimant options as to how it might be dealt with. He asked the claimant if he wanted him to speak to the Network Operations Manager, to both of them or if the claimant himself would speak to the Network Operations Manager, the option which the claimant followed and which, so far as the CEO in his evidence stated, resulted in situation improving.

Events came to a crisis situation with the involvement of G in high site construction work and, in particular, with the proposed construction work in Dun Laoghaire in November, 2006 and there is conflicting evidence in this regard.

The claimant's evidence is that he told the Network Operations Director at a meeting in early November, 2006 that he could not work with G if they were selected for the Dun Laoghaire site, because of his reservations about their experience and qualifications, but his health and safety related concerns were totally ignored. He went to check G's qualifications with the Health and Safety Officer who referred him back to the Network Operations Director who did not clarify the matter. His own enquiries suggested that G lacked qualifications and certification for the job and he was afraid that, as PSDS involved in the design of the Dun Laoghaire project he would be held responsible if anything went wrong. He also feared that the involvement of G in his domain of high

rise construction would inevitably mean that he could not continue working with the company if his health and safety related concerns were ignored. In his evidence he indicated that, when he received an anxious call from the High Site Engineer (RC) that the Dun Laoghaire project was being powered up in an unsafe state, he went out to as PSDS to inspect the site and his worse fears were confirmed. He indicated that there were 35 faults identified by him and that he had recorded these in photographs. He submitted four photographs in evidence to the Tribunal of aspects of the construction which he regarded as characterising particularly unsafe work and he fundamentally questioned the failure, as he saw it, to close off the street for safety reasons and bring in a crane to lift the necessary equipment on to the roof where the communication equipment was to be installed, rather than an unsafe and unsuitable arrangement involving the use of a crane from an adjoining building site without closing off the street.

This was the last straw. He communicated and summarised his concerns by email to the CEO and to the Non Executive Director (in commenting on a copy of an email sent by the Non Executive Director to the CEO) and he ultimately felt forced to resign because his future with the company, through the company's failure to address both the interpersonal bullying and the health and safety concerns, had become untenable. He was now, on 22 November, 2006, on sick leave suffering from, as his doctor's report substantiated, work related stress and he could not reasonably be expected to return to a situation where he was constantly being professionally and personally undermined. At time of resignation he believed that he was entitled to compensation in relation to his entitlement to bonus and his share options. He was also concerned that any continuing responsibility for design be cancelled and his solicitor, in confirming his constructive dismissal had also notified the respondent company in this regard.

An entirely different story was given in evidence by the respondent company. The Technical Manager, who appeared to the Tribunal to be a very professionally competent witness, indicated that the snagging process for the job had not been commenced at the time the claimant called to the site and that the job was completed safely and satisfactorily. He indicated, as did the CEO, that the company was satisfied that G was well capable of doing the job safely. He said that he had seen the necessary high level training certification of G staff. He submitted ECSSA certification in respect of G and he indicated that the various technical and health and safety related steps and processes were properly completed by the respondent and by G before the Dun Laoghaire project was brought live. His detailed evidence also fundamentally disagreed with the claimant in relation to the appropriateness of using a crane from the adjoining building site and disputed the conclusions drawn from the photographic evidence submitted by the plaintiff. The Technical Manager in his evidence indicated that he and not the claimant was the PSDS for the site, as the claimant would have nothing to do with it based, he understood, on concerns about selection of G. This was the first occasion on which the claimant became aware that he was no longer PSDS for this job. Brief evidence from the Health and Safety Officer did not identify, from her perspective, any healthy and safety concerns in relation to G.

The final stage of the claimant's career with the respondent company, from 21 November to his resignation in December, 2006, is clearly set out in the evidence and is also referred to in the respective summing up by both parties set out earlier in this determination. The claimant was genuinely convinced that, given they way the company had dealt with him, his career with the company was over and that he had no reasonable alternative but to resign.

It is, in the Tribunal's view, clear that, however negligent the respondent company had previously been in failing to address his concerns, every effort was made by the company on this occasion, with the benefit of the expertise of the HR Consultant, to ensure that a facility would be accorded to the claimant to have his grievances examined and, given his stressed condition, that he be accorded



every opportunity to take stock of his situation and to make decisions as to his future, perhaps in a better frame of mind at a later stage.

The Tribunal attaches great importance to employers following disciplinary procedures in the dismissal of employees. The Tribunal must, equally, attach such importance to the need for employees, unless there are compelling reasons to the contrary, to follow grievance procedures before they unilaterally resign. The legal cases in this regard are well documented.

The central issue for the Tribunal, therefore, is whether the claimant was justified in leaving without first availing of the respondent company's grievance procedures. The Tribunal, having very carefully considered the evidence, considers that the claimant was not so justified. The Tribunal, in arriving at this decision, is especially influenced by the facts that, despite the importance of the issues to the claimant, at no time were they pursued in any formal sense in writing with the company. The only formal document in the claimant's name is the email of 22 November 2006, furthermore, the informal facility previously used to take up the matter with the CEO was not pursued when the situation again deteriorated in the period leading up to November, 2006. If health and safety was perceived as a life and death issue it is not unreasonable to expect that it should have been raised formally by the claimant with the company. The claimant also failed to give any indication to his newly appointed superior in November 2006, during his performance appraisal discussions, that there were any work related problems which needed to be urgently addressed.

The Tribunal considers that the claimant's overall health and safety concerns about the nature of the work done by G at Dun Laoighaire were not substantiated on the evidence (based on the crane issue and the four photographs) and that, rather than being an immediate justification for resigning, it would have been reasonable if the full list of 35 (29 mentioned in the email of 22 November, 2006) complaints could have been examined in a more considered way with the participation of the claimant. The Tribunal has also been influenced by the fact that the claimant's resignation, rather than an immediate imperative arising from the circumstances, became, at least so far as timing was concerned, linked to the question of payment of bonus and compensation for share options. The claimant went on sick leave on 21 November and continued discussion with the respondent company until 13 December when he undertook to deliver his letter of resignation, which he said was in the car, to the company – in the event his solicitor's letter of 18 December, 2006 refers to his resignation as having taken place on or about 3 December, 2006.

The Tribunal also notes that, while there was some contact by the claimant with the Health and Safety Authority, access to the Authority for what essentially would have been non directional advice on the developing situation in the company and on the limits of his own responsibility was not pursued by the claimant. The benefit of objective advice on the health and safety issues arising could well have been beneficial in potentially addressing and possibly resolving difficulties. The Tribunal, on the evidence, does not accept that the claimant was the only person professionally capable in the company of making an informed judgement on health and safety matters and the claimant, in his evidence, indicated that his emotionality in this regard may have been unduly influenced by a previous health and safety related scare.

The Tribunal further considers, on the evidence, that the questions raised by the claimant, based on hearsay, about why the Network Operations Director had selected G may not have taken from a possible resolution of the other issues. More serious issues of health and safety may have been overshadowed by interpersonal difficulties.

While it is most unfortunate that an employee of the claimant's standing in the company would end up genuinely believing that he had no alternative but to resign, the Tribunal considers that he should have utilised the grievance procedures. The Tribunal does not consider that the conduct of the respondent company, although far from perfect, was such as would entitle the claimant or make it reasonable for him to resign without following the formal grievance procedures.

The Tribunal, therefore, determines that the claimant was not unfairly dismissed and his appeal under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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