

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

UD9/2008

Employee

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey

Members: Mr. G. Mc Auliffe
Ms. C. Byrne

heard this claim at Dublin on 23rd April 2008

Representation:

Claimant: Mr Sean O'Gorman, 3 Annaville Avenue, Blackrock, Co Dublin

Respondent: Mr. Tom Mallon B.L.

Instructed by: Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

Claimant's case:

The exceptional circumstances leading to the T1A being outside the time limit is that it originally went before a Rights Commissioner, but he was informed by Christmas 2007 that he would have to apply to the EAT as the Respondent only objected to the Rights Commissioner hearing the case in December 2007.

The Claimant had thirty-six years service, he was caught between the Union and the company's management as to how they dealt with the issue. The 10 to 10 shift vacancy was filled by the company a week after he left. He was treated shabbily, and had not signed a contract of employment. To treat his phone statement as a resignation was facile.

Claimant's evidence:

He said that he worked as an attendant responding to alarm activations and informed the authorities about them. He spent six years with the company, after his retirement from Eircom, where he had

thirty-five years service. He worked a shift pattern (10 a.m. to 10 p.m. three days a week) and was flexible with other staff in operating this. In 2006 he was approached by the Monitoring Manager (IM) to change his shift to 12 noon to 8 p.m., four days a week. This was unsuitable for him. He was told that he could job-share, but that would have meant half pay, and the other person was unwilling to job-share. He was then informed that the change had to take place. There was no correspondence between himself and the company on this issue as he was told that the Union would deal with it. He said he was offered another 10 to 10 shift, but this did not materialise, so he subsequently –jokingly- told IM that he was resigning. He could not understand why, shortly after this a 10 to 10 shift was filled by another person. He said that he was unaware that the company had brought before the Partnership forum the need to change some shift patterns. It was put to him that he was offered four job alternatives, but he said that none of them were suitable. He had not signed a contract of employment. Asked why he failed to respond to letters from the company, he said that the Union had instructed him to do this. He admitted that he had told IM he was resigning. He did not apply for a new 10 to 10 shift as he was told that there was none available. He has not worked since leaving the company as he was claiming unemployment benefit on health grounds, but he said that he does intend to seek work, but was not fit for servile work.

KC's evidence(employee):

She said that she worked on the same shift pattern as the Claimant. She recalled having a conversation with the Claimant about job-sharing. IM had shown her three job options, but none suited her. The Claimant told her that none of them suited him either. She said that she rang the union for advice and was told not to talk to the company, that the union would deal with it. She admitted that she was never informed by the union that they had dealt with the matter.

Respondent's case:

The Claimant was obliged to mitigate his loss, he hadn't done this, so the maximum loss he suffered was the four weeks allowed. It is undisputed that the Claimant resigned, and he himself accepted this. The letter to him from the company left all the doors open, but he ignored it and did not reply. The situation did not constitute a constructive dismissal. The company had engaged in the Partnership forum, what more could they do?

IM's evidence (Monitoring Manager):

The witness said that the company had identified the need to alter shift patterns, and they debated this at the Partnership forum in September/October 2006. The result was that they came out in January 2007 with four work options. The changes were necessary for customer service. He said that the options were put to the Claimant in writing on 14 March 2007, but he did not respond. The Claimant then rang him to say that he was resigning. The Claimant did ask about another 10 to 10 shift becoming available, but he explained that this was only a rumour, that there was none available. In fact, he did ask the Claimant if such a shift became available would he take it, he said no because of the way he had been treated. He left it open for the Claimant to apply for another position, but he did not do so. The union had never told him that he was dealing with the Claimant unfairly. He said that he had no issues with the Claimant and had got on well with him.

Determination:

Having considered all the evidence, the Tribunal is of the view that the Claimant resigned from his post. Communication remained open with the Claimant, inviting him to engage with the

Respondent regarding the proposed change of shift. He was informed by letter on 14 May 2007 that a new shift pattern would be introduced by 21 May 2007, and he was asked to indicate his preferred option. He failed to do this. He was also advised subsequently - given that he had indicated in a telephone conversation that he was resigning – that unless a response was received from him by 31 May 2007, he would be deemed to have resigned.

In his evidence, the Claimant appears to have acted on advice to remain incommunicado with the company, and as a result he made no effort to respond, as requested to by the company on numerous occasions. His contract of employment clearly provided that his shift pattern could vary from time to time, as could his normal hours of work, and that his hours of work and working days at any time depended on the team of which he was a member.

It is clear that the company engaged in protracted discussions in the Partnership Forum with regard to altering shift patterns to assist in the more efficient running of the business, in light of increasing customer demands.

The Tribunal is of the view that the Claimant was given every opportunity to engage with his employer. But the reality appears to have been that none of the proposed options offered suited his expectations, and that he was not amenable to any change whatsoever.

Therefore, the Tribunal finds that he was not dismissed, and that his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

