

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

RP652/2007
UD1151/2007
MN893/2007

Against

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr F. Moloney
Mr P. Trehy

heard this claim at Dublin on 4th April 2008
and 10th July 2008

Representation:

Claimant(s): Mr. Stephen O Sullivan BL instructed by O'Hare O'Connor Walshe, Solicitors,
Ulysses House, Foley Street, Dublin 1

Respondent(s): Ms. Cathy Maguire BL instructed by Ms. Anne Brennan, O'Mara Geraghty
McCourt, Solicitors, 51 Northumberland Road, Dublin 4

The determination of the Tribunal was as follows:-

Respondent's Case

JS told the Tribunal that he was an architect and a partner in the respondent company, which was established in 1986. Prior to that he worked with another architect for fifteen years and undertook a number of projects. He established the business with CH in 1988. In the mid 1990's ten staff were employed and since 1996 JS, CH and the claimant were employed. A student/technician was hired for short time to undertake work on specific projects. In 2006/2007 work slowed down and two major contracts did not proceed. A feasibility study was undertaken on how the respondent endeavoured to obtain work. The respondent operated on a no fee no work basis. In late 2006 and early 2007 it undertook work on an extension. In February 2007 it was not awarded

any contracts and in March 2007 it was refused a planning application for six houses. In April 2007 it had one house inspection for which it charged €450 plus VAT. In May 2007 it had no new work. JS and CH had a meeting with their accountant in March 2007 to discuss what they could do to keep the practice viable. The respondent had considerable financial difficulties and after the meeting with the accountant they concluded that the only alternative was to make the claimant redundant. On 18 May 2007 they met the claimant in the boardroom and CH told the claimant that due to the enormous downturn in business that he was going to be made redundant. After 24 May 2007 the claimant was absent on sick leave until the termination of his employment. The volume of work was not enough for three people and in his opinion there was not enough work for two people. The respondent's financial year was from April to April. In 2008 €130,000 to €140,000 was generated and in previous years €260,000 to €300,000 was generated.

In cross-examination asked when he decided to make the claimant redundant he replied that he met the accountant in March 2007. He did not consider telling the claimant that he was making him redundant. The witness did not have a degree in architecture but he became a member of the RIAI in May 2007. There were three people in the practice and all three were aware work was undertaken on a no fee no fee basis. In the last ten years the respondent focused on residential work. Due to changes in the economy it diversified to other areas. The claimant earned €67,000 per annum. He agreed that up to the date of dismissal the claimant worked on various projects on an ongoing basis. The claimant was not given a contract of employment. He accepted that the claimant was the main person to sign off on projects and that was the procedure that was adhered to. JS was included in the Minister for the Environment's list of qualified architects in 1997. It was not true that an Act was passed in 2007, which admitted him to the RIAI. Asked that it was the claimant's understanding that the business and legal profession would not accept his signature until 2007 he replied that this was not true. It was always better to have a second party sign off on property. During November, December 2006 and January 2007 two major contracts provided a substantial amount of work. He had no recollection of telling the claimant that he would be an associate in the firm. It was not true that in 1999 he suggested that the claimant work on a contract basis. Asked that the claimant was removed from the respondent's letter headed paper in 1999 he replied that could be possible. The claimant was aware of the serious financial situation in the respondent and they had agreed to pay him his increase. There were times when they paid expenses out of their own pockets. For one payment they had to withdraw money from a VAT account. On 10 October 2003 the claimant was informed that he would be paid his increase when fees due to the respondent were received. The respondent did not have a grievance procedure in 2003. It was a very small company and staff had a good working relationship.

Asked if the claimant was accused of stealing a laptop on 2 February 2004 he replied there was no question of the claimant being implicated. Asked if he had a meeting to discuss issues he replied that he thought they had a meeting. The claimant wrote a detailed letter to the respondent on 9 July 2004 in which he outlined his concerns. The associates treated this letter seriously. Asked that they did not appoint someone to mediate he replied it was never an issue, it was a small practice with three staff. There was no question of changing holiday plans and the claimant would not lose holiday entitlements when the respondent changed the accounts year. It had never been the policy to give yes or no answers. Asked regarding the claimant's briefcase on 8 December 2006 he replied that he was upset about that, he was in the office at lunchtime and the claimant asked him if there was anyone else in the office. He was horrified and shocked that there was an accusation against him for opening the claimant's briefcase.

Asked if the claimant was the main designer in the office he replied that he would say so. Asked how they survived without the claimant he replied they had to take on the role themselves. Asked if he had no experience of undertaking work as chief designer he replied he had undertaken designs with his previous employer. During the twenty years that the claimant worked for the respondent the witness was never the chief designer. The claimant has not been replaced and he has not outsourced work. Asked if the claimant was pressurised into signing off on a building that was not in compliance with planning permission he replied that at no stage would he certify work that was not accurate. Asked if the claimant's partner telephoned the office and he told him that some girl telephoned him he replied that may be so. Asked if he knew KOD he replied she used to work downstairs. Asked if KOD will say that the claimant was pressurised into signing documents he replied it was the first time that he had heard of this.

On re-examination on 10 July 2008 in relation to compliance he stated that at any time he could have signed off, himself and his partner felt it more appropriate if one person dealt with certification. He could and did sign documents. The claimant prepared all legal mergers. One building did not comply with planning regulations and he did not put the claimant under pressure to sign it, he asked the claimant to visit the site and prepare a list of items, which did not comply. The witness was not prepared to sign, the retention permission was granted and the claimant signed the certificates. Asked in relation to the certificate that was given to the claimant the day before he was dismissed he replied there was only one certificate outstanding and the house had not sold. Due to the downturn the client needed a certificate of compliance. A project was cancelled and if it had not been cancelled the respondent would not have implemented redundancy. After the claimant was dismissed the respondent virtually had no work. The claimant was not replaced and the difficulty at the moment is having enough work for two people. The claimant was not entitled to sick pay and the respondent would pay only over a short period

In further cross-examination asked when he was admitted to the RIAI he replied May 2007. When he was inducted into the Minister's list in 1996 he was entitled to sign off as well. Asked if the RIAI was a very significant event he replied that he did not have to join the RIAI.

The second witness for the respondent RE a chartered accountant told the Tribunal that he audited the accounts for the respondent for the past twelve years. An amount of €210,662 on 30 April 2003 indicated that fees were charged by the practice less VAT. At any year-end debts outstanding could be paid in subsequent years. The Revenue Commissioners insisted that the respondent document the value of work completed within the year. In 30 April 2007 €297,758.72 was recorded for fees issued less write offs. In April 2008 the fees issued were €112,501.12 excluding VAT.

He attended a meeting on 22 March 2007 with both partners. The partners were concerned with the level of work, a project was cancelled and there was no sign of future work. There was no income in the pipeline. They discussed making one employee redundant and the decision was borne out by the invoices.

In cross-examination he reiterated that he was concerned at the meeting on 22 March 2007 that no jobs were coming in and there was no work for 2008. One project that was underway was quite lucrative but when that was completed there was no work on an ongoing basis.

The third witness for the respondent CH told the Tribunal that a tenant left the premises at short notice and two laptops were left behind. He told the claimant about this and he felt responsible for the safety of the laptops. He then discovered that a laptop was missing; he told the claimant that he

was going to report this matter to the gardai. There was absolutely no implication that the claimant had taken it. He relayed an occasion when he received a telephone call from the claimant and he put it through to the claimant's office. He received a second call and he went to the claimant's office, he was not there and he had no idea where he was. The claimant often went to the shop. Fifteen to twenty minutes had elapsed and he reached the claimant in an office downstairs. He mentioned to KOD a tenant in this office if she needed to talk to the claimant to let them know.

In cross-examination he stated that he told JS first that the laptop was missing. Asked if he asked the claimant if he knew anything about a missing laptop he replied he did not ask that question. Asked if he called the gardai he replied that he reported the matter to the gardai that evening. Asked if he knew that it was the claimant's birthday he replied that he did not know.

Claimant's Case

A witness on behalf of the claimant KOD told the Tribunal that she rented premises downstairs. Early in 2007 the claimant mentioned that he was fifty and she invited him to her office for birthday cake and coffee. CH later came down and told her not to talk to the claimant during working hours and that she could talk to him out of office time. She was very surprised and thought it was mean spirited. She responded to CH "fine if that is what you want that is what I will do". The claimant always said goodbye to his colleagues when he was leaving but the greeting was never reciprocated, it was always met with silence and it was indicative of the atmosphere in the office.

In cross-examination she stated she was a tenant in the building. On one occasion she was aware that a serious argument took place in the respondents' office and most of the time she did not hear anything from the upstairs office.

The claimant told the Tribunal that he qualified as an architect in 1981. He joined the respondent in 1988 and previously undertook freelance work on design and certificate work. He was the senior architect and undertook work in project design, certification and legal documents. He also undertook drawing and three staff shared the office, a technician, a secretary and a temporary architect. For the first five years the respondent had other employees and he was the only qualified architect. He was promised that he would be made an associate but in the late 90's there was no sign of it happening. He asked JS about becoming an associate and he knew that the promise of associate ship was dead. In June 2002 he was sidelined from projects. JS told clients that he undertook designs that the claimant had undertaken. The claimant's role on site was completely undermined. If he requested a document he would be snapped at and if he enquired about a document he was ignored.

On 27 September he submitted a letter of complaint regarding payment of salary increase. He discussed this with both partners on 30 July 2003. In a letter dated 4 January 2004 he documented his concerns regarding his pay review, his salary increase and Christmas bonus. He was always given a Christmas bonus and he was informed that there was not enough money for a Christmas bonus. In February 2004 CH asked him if he knew anything about two laptops, which were missing from the premises. These laptops were missing from an office, which had just been vacated. He felt accused and he told CH that he had nothing to do with the laptops. On 9 July 2004 he sent a letter to both partners in which he outlined his many concerns and the fact that he was being undermined. JS kept referring to designs as his, which the claimant had prepared and the claimant's role was being minimised.

The claimant felt after 2002 that the atmosphere in the office had changed and that they wanted him

out. He wrote letters, which indicated that he wanted to return to a normal working environment. One large development consisted of 108 houses, he was senior project architect and he prepared plans for this. He was prevented from meeting the new planner on this project.

On 14 May 2007 JS summoned him to his office and he asked him if he was aware of the latest developer building control bill and he replied that it was signed in law. On 18 May 2007 he was summoned to a meeting and prior to that he sent an e-mail requesting a salary review. The claimant was told he was being made redundant, he was upset and he was never aware of the situation. He told the partners that the matter would have to be discussed. The claimant was too upset and he left the meeting.

The claimant relayed on occasions if his partner telephoned the office that JS would say to him that a lady telephoned and he found this behaviour insulting.

On 18 May JS came to his office, the claimant was in a state of shock and he was not kept up to date on projects. He was totally ignored and he felt very bad. Prior to this he attended the doctor and he was prescribed medication for depression. He was never on medication for depression prior to this and he is still on medication.

In cross-examination he stated that he completed time sheets and due to the volume of work that he undertook some projects were not included in the time sheets. Fees were charged on a percentage basis including larger works in the office. There was plenty of work at the time and he was busy on smaller projects. In relation to Clontarf Lawn Tennis Club it was an extension to the clubhouse. He never negotiated fees with clients. Some designs were completed for the CLTC project in February and he attended site meetings. He undertook designs for a mews house. There was plenty of work to be undertaken in the office in December 2006. In May 2007 he was being isolated in the office and he was aware that CH and JS were working on projects and if he enquired about the projects he did not get a response. He stated that he was not consulted about work and that he was doing plenty of work. That the complaints he made in 2004 did not fall by the wayside and nothing was ever done to deal with them. He discontinued to write letters to the respondent because it made matters worse. When he was asked about the laptop he replied that he was shown a cardboard box by CH. He was summoned to CH's office and the issue of the laptop was raised. In relation to homophobic comments and the calls he received he replied that he received telephone calls from both men and women. If someone telephoned him and he was asked about the call he would reply that it was not from a female.. Regarding the occasion when he received two telephone calls and when KOD was asked not to interrupt him during office hours the claimant stated that his colleagues knew where he was and they could hear the staff in KOD's office singing happy birthday to him.

In response to a question from the Tribunal he stated that there was a downturn in the market but there was plenty of work for small firms and a number of planning applications had to be dealt with in 2006 and 2007.

Determination

The claimant made the following assertions:-

Headed paper: the claimant claims that his name was taken off the headed paper. From the evidence given it appears that this occurred in 1999 and the Tribunal would feel that this would not have a relevance in this case.

Birthday cake: the claimant had a birthday cake purchased by the staff of the other undertaking in the building in February 2007 and he was invited down for a tea break by the staff of that undertaking to partake of the cake. During this celebration it appears that some calls came in for the claimant. CH approached KOD, the person who purchased the cake in respect of this matter and stated that he did not want them talking to the claimant during working hours. The Tribunal in considering this matter are of the opinion that CH acted injudiciously in taking the action that he did in view of the claimant's long service and his senior position within the undertaking.

Telephone calls: the claimant asserted that calls made to the office by his partner were misinterpreted by JS who informed the claimant that the calls were made by a lady rather than the claimant's partner. It is the view of the Tribunal that this was inappropriate on the part of JS.

Computer: a lap top went missing in an office of the respondent. The claimant was taken to that office by CH and questioned regarding its disappearance. The manner of this investigation left a lot to be desired.

Lack of communication: the claimant gave evidence of the lack of communication between the partners and himself over a protracted period up to the date of his dismissal. The Tribunal determine that this did occur and that it had a severe impact on the claimant's relationship with the partners. In a small office where there are few employees good relationships between staff is absolutely necessary.

Claimant not getting recognition for work that he undertook: the Tribunal also considered the question of JS taking credit for the work of the claimant and attributing it to himself. This was not appropriate and should not have occurred.

By majority, Mr. Moloney dissents, as he believes that there was a redundancy situation. The Tribunal finds that the claimant was unfairly dismissed and awards him compensation in the amount of €34,000 under the Unfair Dismissals Acts, 1977 to 2001. As the Redundancy Payments Acts and the Unfair Dismissals Acts are mutually exclusive no award can be made under the Redundancy Payments Acts, 1967 to 2003. As the claimant was not available for work and not actively seeking work after his dismissal he is not entitled to compensation under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

