

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:

CASE NO.

Employee

UD2/2008

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. L. Ó' Catháin

Members: Mr. M. Forde  
Ms. P. Doyle

heard this claim at Cork on 21st October 2008

**Representation:**

Claimant: Mr. Michael Deasy BL, instructed by Murphy & Condon, Solicitors, Bank Buildings, 2 Shandon Street, Cork

Respondent: Mr. David Gaffney, Coakley Moloney, Solicitors, 49 South Mall, Cork

The determination of the Tribunal was as follows:

**Claimant's case:**

The claimant gave evidence that he started work on 26 September 2005 with the respondent. His role was to ensure that Health & Safety was adhered to, recruitment and training of staff, and getting members to join the club. He was successful in this and the club had 1350 members by the time he left. He said that an internal audit assessment was conducted by NK, also that the report which came from this audit was critical of him, and that new procedures would have to be introduced. This was done and after five months there was no further criticism of him, nor any disciplinary action.

However, he was called to a meeting by the General Manager of the complex (DL) on the day he came back from holiday on 28 June 2007. DL said that the company was in a "sh..." state, and that he didn't think that he (the claimant) could do the job, and he was given three options.

- 1) To walk out and take the club to a tribunal.
- 2) To work his notice

3) To stay and sort it out, but as a result he would be over-monitored.

He said that he was then given a disciplinary letter. He said that he was given no advanced warning of the meeting, nor was he afforded the right to representation. He said that DL told him that if he stayed he would be over-managed, and that it wouldn't be a pleasant experience. He said that he was shocked and asked for time to think about it. He met DL again on 29 June 2007 and he made the decision to resign. He had just bought a new house, so his financial circumstances were not good, and he had no arrangements for a job elsewhere. He felt he had to resign, because he needed to get as much cash as possible, and he also needed to leave the company on good terms if he was to get a decent reference from them. After he left he got some temporary work until he got a new full-time job in January 2008.

He agreed that he received a contract of employment in February 2007. He denied that he was given a warning on 1 February 2007, but that DL and two other senior colleagues had told him in the bar to pull his socks up. He said that after the meeting on 28 June 2007, he felt that he was finished, he saw the situation as a constructive dismissal. He was also handed a written copy of a verbal warning, and he felt that there was no longer any confidence in him to run the club. It was his view that it was a disciplinary meeting. When asked why he would choose resignation if he was in financial difficulties, he said that he took the option which would give him the most cash and the most weeks of work. He felt that he was being nudged out anyway, so he chose to go at that time.

#### **Respondent's case:**

The General Manager of the complex (DL) gave evidence that the claimant reported to him and that they had a good relationship. The claimant would pre-sell the club to members, he was brought in as an expert and had great autonomy in his role. Issues arose after an internal audit assessment was conducted by NK in which many shortcomings of the system and the claimant were identified. On foot of this audit a verbal warning was issued to the claimant.

He called the claimant into a meeting on 28 June 2007, where he explained that he was concerned at the club's performance and that he needed to get away from the previous "touchy feely" attitude, and to introduce new procedures. All he was trying to achieve at the meeting was to introduce an improvement plan for the claimant in relation to his shortcomings, so he was surprised when he decided to resign. He didn't want to get rid of the claimant, in fact he himself ended up having to run the club, along with a colleague, until they could find a replacement for him. He said that the meeting on 28 June 2007 was not a disciplinary meeting, and that the claimant was not given three options, but that the meeting was held just to formalise a procedure going forward. He did give the claimant a written copy of the verbal warning issued to him at the meeting of 1 February 2007.

He said that the claimant asked him could he (the claimant) turn the club around, and he said that he didn't think so, but to have a "go". He didn't think the claimant would leave. A few days later he received a letter of resignation from the claimant, but it was all amicable. He gave him a reference that same day. The claimant never said that he had been hard done by. There was no ambiguity at the meeting on 28 June 2007.

He denied that what he gave the claimant at the meeting on 28 June 2007 was a written warning, but merely a written copy of the verbal warning issued to him at the meeting of 1 February 2007. He agreed that he didn't afford the claimant the right of representation at the meeting because it was only a confirmation of the previous meeting. The meeting of 28 June 2007 was not a disciplinary meeting. Asked why he thought the claimant walked, he said all he could think of was

that he had an interview for a job soon after, and that maybe he thought he would get that job. He didn't agree that issuing the warning to him, and then giving him a good reference were irreconcilable, because he needed the reference to get another job. He said that maybe he should have been tougher, but that wouldn't have been fair to the claimant. Asked why the verbal warning was not recorded at the meeting of 1 February 2007, he said that he wanted a proper procedure put into action. He disagreed that saying to the claimant he didn't think he could do the job was tantamount to dismissal, the claimant had asked him could he turn it around he said he didn't think so, but to give it a go. At no time did he say to the claimant that he would be over-managed.

**Claimant's closing submission:**

There was evidence that the claimant was called to a meeting of a disciplinary character. It is for the Tribunal to decide if fair procedure was used. The claimant's evidence is that he was told he was not up to the job, so it was reasonable for him to take the option he did. The claimant was told that he couldn't turn it around, so mutual trust could no longer be maintained. He attempted to mitigate his losses. It is a case of constructive dismissal.

Cases quoted: ud69.79; ud226.86

**Respondent's closing submission:**

There is a conflict of evidence as to what led to, and what transpired at the meeting of 28 June 2007, but it is up to the claimant to prove that he had no other option. They had an open and amicable relationship with the claimant, and the meeting did not result in any heated exchanges, but just a discussion on his shortcomings. He was not issued with an ultimatum, but told that he would have to improve his performance. He had other options than to resign, it was open to him to stay and work it out. The claimant was the author of his own misfortune. He issued a letter of resignation on 2 July 2007. If the employer had wanted to get rid of the claimant, they would have had someone ready to replace him. The employer was probably too reasonable to the claimant, and they could have reprimanded him for other issues. The claimant's case should be dismissed.

Cases quoted: ud104.79; ud474.81; ud654.91; ud347.97

**Determination:**

After careful consideration of the evidence and the submissions made, the Tribunal finds that the claimant did not reach the required level of proof to establish constructive dismissal.

The Tribunal finds that the dismissal was not proved, therefore the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

