

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee - claimant UD231/2008
WT111/2008
MN218/2008

against

Employer. - respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. D. Hegarty
Ms. H. Kelleher

heard this claim at Cork on 15th September 2008 and 9th December 2008

Representation:

Claimant: Mr. John Boylan, McNulty Boylan & Partners, Solicitors, 26/28 South Terrace, Cork

Respondent: Mr Tony Stout, IBEC, Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:

Claimant's case:

The claimant did a good job. He was told by JB in the 1st week of January 2008 that the company would no longer invest in him, and to consider his position. He was then told to get another job and to finish by 1 April 2008. At the last meeting on 29 February 2008 he was asked to sign a document saying that he left by mutual agreement. He refused to sign this and walked out.

The claimant gave evidence that he started with the company on 16 October 2006 as Director of Sales and Marketing. He did a good job. He had problems getting parts back to customers on time.

He never got a verbal or written warning, and got a good appraisal in January 2007. He was shocked when told by JB that he had 2 months to get a new job. JB wanted to restructure the company. When presented with a document saying that he was leaving by mutual agreement, he refused to sign it, said he was being shafted and walked out. He never had any intention of resigning. He got a new job in May 2008 at 60,000 per annum but has no perks, whereas he was earning 84,000 with a bonus etc. when he worked for Respondent.

On cross-examination, he said he didn't get any notice of dismissal and denied there was a series of meetings with JB about his future. He said JB approached him only once. He was aware of the grievance and personnel procedures of the company, as outlined in his conditions of employment document. He refused to discuss the situation further with JB after feeling he had been shafted at the meeting on 29 February 2008.

Respondent's case:

It is a case of constructive dismissal, the claimant walked out. The company never instigated a disciplinary procedure, so they could not have dismissed him. Instead of trying to resolve the ongoing difficulties that he had been having within the company, he chose to walk away.

The CEO of the company (JB) gave evidence that he hired the claimant in 2006. The claimant began his job by getting to know the industry, and he performed this task well. The first time he had issues with the claimant was in summer 2007 when they travelled to Asia together. The claimant had problems with the foreign culture. He made some mistakes, one in particular when he offered repair services to a company that they were unable to fulfil. A review then took place whereby the focus was put on internal issues rather than external ones as a way forward for the claimant.

In November they had their first in depth discussions, and he asked was the claimant really the man for the job assigned to him. He decided to give it another go, but he came to the conclusion in January 2007, following more discussions with the claimant, that he wasn't cut out for the job. He said that the claimant agreed that this was what must be, and he gave him some time to look for another job. The claimant said it would take him at least 6 months to find a comparable job, but he hoped he could be gone by 1 April 2008.

He said that the claimant was not comfortable with the mention of their discussions about his departure being written down in his final appraisal, and felt he had to walk away. He told him that this would not solve anything. He told the claimant to come back the following week after giving it some thought, but he walked out. He was surprised by the claimant's reaction. He then consulted the HR section and asked them to contact the claimant to ensure he was ok. The following Monday they received a letter from the claimant's solicitor. When the claimant walked out it caused the company many problems, both internally and with their customers.

He accepted that the claimant sometimes worked long hours. He denied that the claimant brought many new customers into the company or that he was the driving force in the company in the area of increasing its sales, he said all this was achieved through teamwork, and the claimant was just one member of the team. He also said that the claimant had made some sales that were unachievable, in the sense that the servicing could not be completed within the time scales requested by these customers.

He accepted that the claimant's initial appraisal was good. He denied that the claimant was upset

when he told him in January that he would need to look for another job. When he was asked had he dismissed him, he said that he decided that he had no future in the company, and that the claimant and himself came to an agreement about this. He accepted that the claimant had no option but to leave, and that he had decided that the claimant must leave. When he said in the documentation that the claimant left by mutual agreement, he meant by this that the date of his leaving would be mutually agreed. When the claimant saw what he had written about him having no future with the company, the claimant said he felt that he was dismissed and felt he should leave immediately.

The idea of the claimant having to leave was first mooted in November 2007, and the decision was made to let him go in December 2007. He accepted that the claimant had received no written or verbal warnings prior to their meeting of 27 February 2006, but he had told him that there was no future for him.

The HR manager (DC) gave evidence that he held this post for the last 4 years. He said that JB came into his office on 29 February 2008 saying that the claimant had walked out in the middle of his appraisal. He tried to contact the claimant without success, until the claimant texted him that night to say he was ok. He was involved in the claimant's recruitment. He said that the claimant knew of the grievance procedures within the company. He said that JB did not inform him that he had decided to dismiss the claimant, and that JB dealt exclusively with employees that reported directly to him. The claimant never sought to instigate the company's grievance procedure, nor had he queried the HR section in relation to what occurred at the meeting with JB, which led to his walking out. He didn't think it was unusual that a verbal appraisal was conducted with the claimant before his final written appraisal, although he couldn't say where in the company's procedures does it refer to verbal appraisals.

Claimant's closing submissions:

It is not a constructive dismissal. Without consulting anyone else JB decided to terminate his contract. The decision was made in December 2007 and confirmed at 3 meetings in January 2008. The only thing then left for discussion was when he would leave. JB and DC referred to resignation, but his contract was terminated by JB's own evidence. You can't resign if your employment has already been terminated. Then it is up to the respondent to prove dismissal was fair, but by the employer's own evidence, there was no procedure, no warnings – verbal or written – and no meeting with the claimant to warn him that he could be let go. JB did a solo run, didn't engage HR or other managers. The claimant's performance was never criticised. How he left is irrelevant, because his contract was terminated at the first two meetings in January 2008.

Respondent's closing submissions:

The T1A says the claimant's employment ended in February 2008. This contradicts the claimant's evidence. There is no doubt that he ended his employment by walking out. JB did decide that there was no future for the claimant in the company, and he tried to give him every opportunity to move on in his career. The claimant received his contract of employment and the grievance procedure. The company did not approach this case in a disciplinary way. The claimant agreed that his future was not in the company, and did seek work elsewhere. There were difficulties with the claimant's performance, and many meetings were held about these issues from November 2007. He left of his own volition. He was asked to consider what was discussed, but he chose to walk out. His actions were unreasonable and unwarranted. There is no basis for a constructive dismissal claim.

Cases quoted:

Conway v. Ulster Bank - ud474/81

Julie Ann Kiernan v. Primark - ud270/03

Determination:

The Tribunal finds that the claimant's dismissal was unfair in all the circumstances. The dismissal took place when the document was handed to him in January 2008. There were no proper procedures used by the company.

Therefore the Tribunal awards the claimant €25,098.00 under the Unfair Dismissals Acts, 1977 to 2001.

In addition, he is awarded €1657.84 (being the equivalent of one week's gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

He is also awarded €994.70 under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

