

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee - claimant

CASE NO.
UD1070/2007

Against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms B Glynn

Members: Mr P Pierson
Mr J Le Cumbre

heard this claim at Longford on 29th October 2008 and 12th January 2009

Representation:

Claimant: Mr Pdraig Mc Namee BL
Instructed by Kevin P Kilrane & Co
Solicitors
Mohill
Co Leitrim

Respondent: Ms Rosemary Mallon BL
Instructed by Mr Cian Beecher
Arthur Cox
Solicitors
Earlsfort Centre
Earlsfort Terrace
Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant gave evidence that he commenced with the respondent in September 2006; he started as a radio presenter and was taken on to replace another. His show was on air Monday to Friday 21.00 to 24.00 hours. He normally started at 19.00/20.00 hours to allow for research in relation to his show.

When he commenced he received no contract of employment. He reported to the head of

programmes. He was also working at the weekends spinning, ensuring good quality and that the station stayed on air. The head of programmes had informed him that there would be a change of schedules when he had commenced, he was taken off his Monday to Friday show and changed to a weekend show. His show now was broadcast Friday night 10.00pm to 1.00am and Sunday 11.00pm to 1.00am and his hours were increased in respect of the spinning. At this stage he said he loved his job, he had one progress meeting with the head of programmes and no problems arose at this. Another employee joined the respondent also spinning at the weekends; he had spent a lot of time with this new employee settling him in to the organisation. At this time there were drastic changes in the scheduling of programmes. The official notice of the change in schedules was left in his pigeonhole; no manager or supervisor had explained to him that these changes were taking place. A copy of this notice dated 8th November 2007 was opened to the Tribunal. There was no mention of him on the new scheduling. Through his colleagues he was made aware that changes to the programming were being scheduled, so in advance of receiving the notice he had attempted to contact the general manager four or five times to arrange a meeting with him. After receiving the new schedule he had presumed he was out of a job so he went to see a solicitor who advised him to use the company's grievance procedure to clarify his situation. The respondent's grievance procedure was produced in to evidence, the claimant confirmed that he had never seen or received this document before.

He met with the general manager on the 12th of November 2007. He asked why his show was taken off air; he was told it was a change of format. At this meeting he was told they were looking at the possibility of him doing a breakfast show but no direct offer was made in relation to this. However he was also told his voice suited nighttime radio. At this meeting no explanation was given to him why he was taken off air. He was not sure whether he had a job, as nothing was mentioned about his weekend work and he was not sure if this was secured. Another employee had started two/three weeks before the schedule change, and he now had two shows during the week and weekends.

He did not know how to invoke the grievance procedure, as he was not aware the company had one, and had never received a copy of it. He found himself in a position where he did not know whether he had a job or not, he had a young family to support. From what he understood from the meeting with the general manager it would have been not possible to stay with the respondent.

On the 14th of November he wrote his letter of resignation to the respondent. This was read into evidence. His working hours were being cut and he felt he had no option or choice to resign; he needed to find alternative employment. If a definite offer had been made in respect of the breakfast show he would have stayed.

The JNLR listenership figures were introduced in to evidence, which shows a decline in audience on his shows. He explained that he was never made aware of this figures and was not advised that the listenership was in decline. As far as he was concerned he learnt the format of the show and kept that format.

Under cross-examination he explained he was also broadcasting on Thursday nights for about four months up to the schedule change. He confirmed that he received €11.00/11.15 per hour for the spinning and €60.00 per show and accepted that the spinning made up his main income. It was his first job in radio. He accepted that numerous changes were made to the scheduling about seven colleagues were affected including one who had broadcast the breakfast show at weekends for 17 years and now would broadcast the breakfast show on weekdays.

It was put to him that the general manager would say he had tried to contact him before the

schedule memo was published, he replied by saying that he was contactable on his mobile or by email. An email was introduced into evidence in which he informed the general manager that he had lost his mobile phone prior to the schedule changes. On this email he had included two other phone numbers at which he could be contacted. He did not recall sending this email and thought he had lost his mobile phone later on in the month. He did not agree he was a difficult person to contact.

Counsel for the respondent explained that a staff meeting had taken place in July 2007 at which the listenership figures were explained, the claimant said he did not attend that meeting as he was working that evening and not available. He denied that the figures were outlined at the meeting he had with the general manager on the 12th November 2007.

At this meeting with the general manager on the 12th November it was put to him that the general manager had told him he would keep his spinning duties and receive an increase from 60.00 to 100.00 for the breakfast show. The claimant said that he was told there was a possibility of breakfast show with a payment of €100.00 per show. He was not told that his spinning duties would remain the same; he had asked about the spinning but had not received clarification.

He confirmed he did not receive a staff handbook with the grievance procedure when he commenced employment. When he had received advice from his solicitor to use the company's grievance procedure, he had met and asked the general manager questions to which he had not received clear answers. His letter of resignation was referred to in which he gives no reasons of clarity to his actions, he thought it was fairly clear he was resigning because of the new schedule and he was not sure how his hours were to be affected.

He admitted that the schedule memo would probably have no affect on his spinning hours but had not received any confirmation to this at the meeting with the general manager.

Previously before working with the respondent, he had worked in a computer store and had done DJ'ing at the weekends. He had applied for jobs since resigning but had no copies of these at the hearing. Presently he DJs every Thursday night and also does gigs when available. He had no record of income for the last twelve months. He had applied for a social welfare payment, however did not have a copy of his P45 to hand so did not follow this application up.

In replying to questions from the Tribunal, he confirmed he had no interview with the respondent; he had dropped in his CV and demo tape to the then head of programmes, and was on air before he got paid. This head of programmes resigned before the schedule change in November 2007. He had never discussed holiday or sick pay with his employers. He had walked away from the meeting on the 12th November not understanding his position with no clear answers. His average monthly pay while in employment was 1600 – 1800 per month.

He was initially taken on as a presenter; his spinning work was about 80% of his work with the respondent. He had received no response to his email of the 5th November to GM His show was broadcast on both stations simultaneously.

Respondent's Case:

The General Manager (GM) of the respondent company gave the respondent's evidence. He joined the company in April 2007, and therefore, was not present when the claimant commenced his employment with the company in 2006. No written contract of employment could be found for the claimant by the respondent company.

Listenership figures showed that the claimant's radio show and other shows had poor ratings. In June 2007 GM called a meeting for all staff to attend where the listenership figures were presented and discussed. The claimant wasn't present at the meeting, but GM considered that he could have gone to the head of programmes afterwards if he wished to see the figures. Due to the figures changes were made to the programme schedule in November 2007. GM spoke to the main presenters first and then all staff one by one. He disputed that the claimant received the memo on scheduling changes on 11th November 2007 as GM had only mailed it to his assistant on 12th November 2007, having drafted it on 8th November. GM contended that the claimant's name not appearing on the new schedule did not mean he didn't have work to do at the station, as his spinning work would be unaffected. GM agreed that spinning accounted for 80% of the claimant's work.

GM received an email from the claimant on 5th November 2007 providing him with new contact details as his mobile phone had been stolen. The claimant also asked if the new scheduling changes would be affecting him and asked to be considered for Saturday and Sunday slots. GM left a message for the claimant about his email. GM denied that the claimant could not get through to him or that reception would tell him that GM was in a meeting, and said that he had an open door policy for staff. He considered that the claimant could have discussed his concerns with him when they were in contact over covering programmes. He was glad when the claimant sought a meeting with him on 11th November 2007 as this meant he had spoken to all staff and could send out the memo about the scheduling changes. The changes affected seven employees with two losing their jobs.

At the meeting of the 11th November GM explained the listenership figures to the claimant and his desire to have continuity on the Monday to Friday slots. He offered the Saturday breakfast slot to the claimant and confirmed that his spinning work would not be affected. The claimant was unsure about the Saturday morning slot as he had other DJ work on weekend nights and was to come back to GM about it. He did know why the claimant could have been unsure of his position after the meeting and as far as he was concerned the breakfast slot had been a definite offer, but not made in writing. He received the claimant's resignation letter two days later and did not know why the claimant had resigned. GM couldn't say if the claimant had received a staff handbook, as it would have been before his commencement, all staff members have now received a staff handbook.

Determination:

In this case the claimant is claiming constructive dismissal. A constructive dismissal will occur where an employee terminates a contract of employment in circumstances in which, because of the employer's conduct, either the employee was entitled to terminate the contract without notice, or it was reasonable for the employee so to terminate it. The question of constructive dismissal must therefore be considered under two headings...entitlement and reasonableness;

Entitlement:

The tribunal has always emphasised that there must exist in the continuing relationship of employer and employee a mutual need for trust and confidence. This was put succinctly in Brady –v- Newman UD330/1979 when the tribunal said, “as an employer is entitled to expect his employee to behave in a manner which would preserve his employers reasonable trust and confidence in him, so also must the employer behave”. In this case the claimant commenced work with the respondent in September 2006 and was happy in his work until November 2007 when he became aware, in early November, that his show was being cancelled. His evidence was that prior to receiving a memo notifying him of same, he had heard rumours that changes were afoot, and he sought to meet with the GM on several occasions, to ascertain if these changes affected him, but was unable to make contact with him. The GM gave evidence that a general staff meeting had been held in Cavan in June to discuss changes, but the claimant was unable to make that meeting, and no letter was forwarded to him setting out the matters discussed, and decisions taken at the meeting. He first became aware that changes were to be implemented which would affect him in a memo in early November. He subsequently met with the GM on The 12th of November to clarify the situation, but it is clear from his evidence that he received no such clarification and, in actual fact, left the meeting feeling more confused and unclear about his situation. His evidence was that it was indicated to him, at this meeting, that a breakfast show/slot would be made available to him. The GM, in his direct evidence, said that the morning show work referred to at the meeting was an actual offer of work, but the claimant had received no communication, or offer of this work prior to the meeting. It is reasonable to presume that if the Respondent intended to offer this work to the claimant they would have done so contemporaneously with the notification of the cancellation of the claimants show, and certainly, prior to the meeting with the GM. In addition this offer of work is at variance with the GM's evidence that the claimants listenership figures for the claimants show were down. Neither was the claimant given confirmation at this meeting that his spinning and weekend work would continue.

The claimant also gave evidence that from the date of commencement of employment, he had only received one progress evaluation, at which he was told he was doing ok. He had never received any complaints from his employer about his work, or any indication that the listenership figures were falling in respect of his show.

The claimant further gave evidence that he did not receive a staff handbook when he commenced employment with the respondent, nor, a contract of employment, so was unaware of the existence of a grievance procedure within the company, though this was later mentioned to him by his solicitor. The GM's evidence was that he personally gave this handbook to all employees, but confirmed that he was not the GM when the claimant commenced employment with the respondent. He also informed the Tribunal that the claimants Contract of Employment could not be found.

In considering all of the above facts, it is clear that the conduct of the respondent fell far short of that required to preserve the confidence and trust of its employee, as he was not made aware, until a decision was made to axe his show, that there was a difficulty with him, or, the show.

Reasonableness:

Here, the conduct of both parties must be examined. The tribunal has always emphasised that the claimant must have acted reasonably in terminating the contract. Employees will be expected to pursue their grievance through the grievance procedures laid down in the contract of employment

or in the company/union agreement before taking the step of resigning. In addition, the reasonableness of the employee must be examined and his refusal to accept any changes in the terms and conditions of employment, in light of the circumstances and of good industrial relations. In this case, the claimant's evidence was that he had received no contract of employment and indeed the GM, in evidence, stated that no contract of employment could be found in respect of the claimant. In addition, while the GM's evidence was that he personally gave staff- handbooks to all employees, the reality was that he was not in the employment of the respondent company when the claimant became an employee thereof. In the circumstances, it is clear that the claimant was not aware that there was a grievance procedure, until a very late stage when it was mentioned to him by his solicitor, and therefore, could not avail of a procedure of which he knew nothing. Neither is he guilty of refusing to accept changes in the terms and conditions of his employment, as it is clear from the evidence that no written communication was given to him setting out clearly the change to such terms and conditions. In actual fact, it is clear from the evidence of the claimant that while he made an effort to clarify same, he received no satisfactory clarification thereof.

In the circumstances it is clear that the respondent company acted unreasonably in its dealings with the claimant in that they did not, firstly, make the claimant aware of the proposed change to the radio show which would affect his work and, secondly, when the change was implemented did not clarify the situation to him in any way. He was never informed of proposed changes until after they had been decided upon, and even then, he had to contact his employer to find out how they affected him.

Having carefully considered all the evidence and the submissions made, the Tribunal finds that the claimant was constructively dismissed and it awards the claimant the sum of €3,000.00 (three thousand euro).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)