

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD994/2008

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr G. Phelan
Mr T. Kennelly

heard this claim at Limerick on 13th March and 18th June 2009

Representation:

Claimant : Mr. David J Pearson, G J Moloney, Solicitors, City Quarter, Lapps Quay, Cork

Respondent : Mr Lorcan Connolly B L instructed by
Dundon Callanan, Solicitors, 17 The Crescent, Limerick

The determination of the Tribunal was as follows:

Claimant's Case

The company's failure to address his concerns, and their attempt to sideline him, and move him out on 19 May 2008, left the claimant no option but to give in his notice.

The claimant gave evidence that he had 75 employees directly reporting to him and that he reported to the General Manager (PH). At a meeting on 17 April 2008 he was asked to do a presentation whereby an overspend was projected on the budget, but the company's accountant (PM) maintained in his figures that there would be considerable savings made for the year. The Group Managing Director (TB) was critical of the claimant's presentation. The claimant said that his figures had been altered and that profits only were looked at, and not service. He expected PH to say that he had changed the claimant's figures, but he didn't. He sent an e-mail to the company the following morning expressing his concerns.

On 30 April 2008 his annual review with PH was held. He again expressed his concerns at this meeting. PH told him that he wasn't bringing the same energy to his role since his traffic accident in November 2007. He felt insulted by this assertion, as his commitment was 100%. PH felt he

would be better suited in an “analytical role”. This was not explained, but the claimant understood it to be a stand-alone position with no responsibility for staff. He sent an e-mail to PH on 11 May 2008 rejecting this role.

The claimant said he was only paid a bonus of €13,000.00, when he was actually owed €29,000.00 based on his calculations.

He felt he had been clearly earmarked for change, so after thinking about his position for some time, he sent a letter of grievance to the company on 11 May 2008, and resigned on 19 May 2008. PH responded the same day. He believed that PH had already made moves to replace him.

His reason for resigning was due to a number of factors: the change of attitude toward him from 18 April, the lack of support offered to him compounded by his review with PH on 30 April when he was asked to change his role. In addition, he was excluded from the interview process for selecting a new service centre manager, so he was left with no other option.

He has not worked since, he has applied for several jobs but his age and the economic conditions militate against him.

The claimant began life with this company in the early 1990s when he commenced employment with a subsidiary company in the United Kingdom (UK). His eleven-year tenure there included the post of area commercial manager. In the summer of 2002 he secured the position of credit controller in Ireland and less than a year later was appointed as branch manager in Limerick. Due to the merging of the business in the two jurisdictions in Ireland in the summer of 2007 he gained the position of national operations manager. The respondent was obliged to report its operations to a UK based office. That office was graced with the appointment of a new group managing director in the spring of 2008.

It was company policy and practice to hold monthly managerial meetings at their offices at Naas, county Kildare when the commercial affairs of the company were addressed. Due to the appointment of that new manager and his wish to visit the Irish office a separate and special meeting was arranged. The claimant was initially shocked at the figures the respondent’s financial controller (PM) presented there as such figures did not correspond nor apply to the claimant’s data. Those figures were changed without his knowledge and he felt embarrassed and humiliated in front of his peers. When he queried that controller on that issue the claimant was told that PH had instructed him to present those figures. The witness felt both undermined and distrustful then of PH. It was his opinion that he had been “hung out to dry”.

That attitude was reinforced when the same manager suggested to the claimant that he was lacking in energy and appetite for his job. PH indicated to him that he would be better placed elsewhere in the company. Those comments, which the claimant disagreed with, were made at the meeting between these two men in Limerick on 30 April 2008.

The witness made certain observations on his salary, bonus and his lack of involvement in the recruitment of staff. He felt excluded from the latter process particularly as applicants would be reporting to him if appointed. He was also dissatisfied with his bonus payment and regarded himself both as an employee and a manager with the company.

The claimant wrote to the group-managing director on 8 May 2008. He listed his concerns and complaints under the general reference of company grievance policy. Following other incidents

regarding his work the claimant posted that letter eight days later to the company office in the UK. On 19 May he penned and submitted a short letter to PH at Naas. That note gave the recipient three months notice of his resignation that was due to take place on 16 August. The claimant did not return to work, as he was medically declared unfit for that purpose. He did not accept PH's assertion that he had a valid contract of employment nor that this manager prefaced his comments before introducing the idea of a new role for him.

On 20 May and still an employee the claimant emailed the group-managing director under the subject whistle blower policy Ireland. That email generated an automatic response stating the addressee was out of the office and a further response less than four hours later from a person associated with the group-managing director acknowledging his email. Apart from that correspondence no further contact was made with the claimant from that source. Nothing was done about his grievances or whistle blower issues. When he learned of the respondent's business briefing dated 20 May announcing his resignation and the interim appointment of a replacement the claimant was reinforced in his view that the respondent indeed wanted rid of him.

Respondent's Case

As part of a restructuring process carried out in the summer of 2007 PH established an all-Ireland operation with a link to its UK business. Such restructuring resulted in the appointment of the claimant to the new position of national operations manager. In September that year PH forwarded the claimant details of his bonus scheme. Among its contents was the condition that in order for a bonus payment to be made then the combined business of Ireland must achieve at least 95% of its profit budget. This was called a minimum profit hurdle. Despite that hurdle not being reached, PH following consultations with others approved the payment of a bonus to the claimant based on his performance and the profits from the Republic of Ireland only.

In the spring of 2008 a new managing director was appointed in the UK and expressed interest in visiting the respondent in Ireland for business purposes. That visit and meeting necessitated each manager to prepare and present facts, figures, and other relevant information to him on their particular roles. The data presented by PM differed from that of the claimant notwithstanding they were using similar sources and methodology. PM indicated that he was basing his figures as supplied by PH. PH accepted he had not told the claimant about his submitted altered figures before the visit of the managing director.

Prior to meeting the claimant on 30 April 2008 PH had been considering an internal reorganisation of the positions in the company and the possible creation of a new post. He had concerns at the time whether the right people held the most appropriate positions within the company. In that regard he introduced the notion to the claimant that he might consider a change in his position. PH felt that the claimant's natural talents lay in a more analytical role. That manager told the Tribunal that the claimant did not have the right qualities for his current job. However, he emphasised that he prefaced his approach to the claimant that there was no threat to his security of employment nor any plans to dispense with his services. Less than two weeks later the claimant told the witness "the ball is in your court regarding my performance and position". The witness commented that the claimant did not seem to want to engage with him from 30 April.

In the course of seeking applications for a service centre manager the respondent received a general application from a highly qualified person who was known to the manager of human resources. That person was duly interviewed and subsequently offered and accepted a position with the

company. PH stated that since this particular selection and appointment was outside the remit of the claimant's role then his presence was not needed at that interview. By late June 2008 that person had been given the role and position of the claimant.

On 19 May 2008 PH made several unsuccessful attempts to contact the claimant by mobile phone. That evening he sent him an email concerning a meeting due to take place the following day. He later received an email from the claimant in which he gave three months' notice of his resignation. In reply PH wrote that he was shocked surprised and greatly disappointed at the claimant's "letter of resignation". He expressed bafflement at the claimant's assertions of constructive dismissal and harassment. The letter writer reminded the claimant he had a valid contract of employment and asked him to reconsider his position or at least at least "engage in some meaningful dialogue around things which are clearly distressing you". The witness did not get a direct response to that letter.

PH made no effort to contact the claimant between the receipt of his notice of resignation and by the time solicitors got involved later in May. That manager had never received any form of complaint or grievance from the claimant up to that letter of intent.

On 20 May PH issued a document called a business briefing to some colleagues and the managing director in the UK. That document read in part:

I would like to advise that A S (the claimant) has made a decision to resign from his position as National Operations Manager and will be leaving the business in the coming weeks.

I will be appointing a New Operations Manager in the coming weeks

The witness also stated that he did not want the claimant to leave and still sought his return as the respondent wanted to utilise his skills. In the meantime the claimant's email facility with the respondent was diverted.

PH was of the view that the respondent's UK office and particularly its managing director had no record of either receiving an email from the claimant dated 20 May 2008 or a letter posted on 16 May. However, he acknowledged the validity of documentation presented on behalf of the claimant that both these correspondences were in fact received. He had not been made aware of that delivery at the time. The letter posted on 16 May and dated 8 May carried the reference of company grievance procedure.

PM outlined his discussions with PH with regard to the presentation of figures due on 17 April 2008 to the overall managing director. Certain adjustments were made as a result of those discussions and then presented at that meeting. The witness explained the background and circumstances to those adjustments to the claimant by email on 22 April 2008. He commented that there was no malice attached in the changing of earlier figures.

The human resources and training manager for Ireland referred to salary increases, bonuses, interviews, and working relationships during her evidence. The email she sent to the claimant, among others, stated all employees will receive an annual increase in April 2008, was despatched for information purposes only. The respondent did not regard the claimant as an employee but as a manager who had separate salary arrangements. The witness also echoed PH's assertion that in theory bonuses reflected the performance of the company on a thirty-two county basis but in practice in this case the performance of the northern six counties were excluded. She accepted there was some confusion about interviews as the company was seeking both service centre personnel

and at the same time another specialised person around the same time. At times both the claimant and the respondent were “at cross-purposes” with this issue but she did eventually clarify it for him.

Prior to the visit of the managing director in mid April 2008 to their offices in Naas both the witness and PH spoke of the need for a person with an analytical role within the company. She described the meeting with that manager as relaxed and informal.

The witness said she was aware of the efforts of PH to contact the claimant several times on 19 May 2008. While she expressed shock at his intention to resign she did not contact him in reference to that intention. At no time during their working relationship had the claimant presented her with any grievances about his employer.

Determination:

The Unfair Dismissals Act, 1977 and section 1(b) therein provides “ In this Act – “dismissal”, in relation to an employee, means — the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer”

In a case of constructive dismissal, the onus is on an employee to show that there was no option but to resign because the conditions of employment were so bad or because the behaviour of the employer was so unreasonable as to make the continuation of employment with that employer intolerable. The standard required to show that an employee had no option but to resign is very high and grievance procedures must have been exhausted by the employee prior to resignation. An employee must be left with no option but to resign in such circumstances.

In this case, the Tribunal finds that the claimant had not met the required threshold that he had no option but to resign from the respondent. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)