

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
-claimant

CASE NO.
UD461/2010

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Mc Grath BL

Members: Mr G. Mc Auliffe
Mr J. Jordan

heard this claim at Dublin on 29th June 2011

Representation:

Claimant: Mr Garrett Fitzpatrick, Garrett Fitzpatrick,
Solicitors, 1a McDermott Street, Gorey, Co Wexford

Respondent:

Background:

The case before the Tribunal is one of Constructive dismissal and accordingly the claimant is first to give evidence.

Claimant's case:

The Tribunal heard evidence from the claimant. He worked fitting / erecting Porto cabins. He had a good relationship with his employer. There were fifteen workers in total in the workplace.

On 31st August 2009 he became aware of redundancies in the workplace; two employees, JD and DH arrived into the work yard and said that they were being made redundant. JD was the yard manager and DH was a general operative. Then his boss (ED) arrived into the yard and told him that he was taking the company van from him. He asked his boss why and his boss said "Because that is my business". After this he went back to his boss and said if you are taking the van I am going to have to leave. He asked his boss if he was definitely going to take the van and his boss told him that he was taking the van off the road. He said to his boss that he may as well give his job to another person. His boss then said, "JD is panicking out there (in the yard) I better go to tell him (that he was not being made redundant). The claimant further explained that his impression was that his boss went straight out to the yard to ask JD if he wanted his job back.

He signed a redundancy slip a few days later.

The claimant explained that another employee (Mr. L) had a company van and Mr. L had less service than he had, also the supervisor had a company jeep,

Cross-examination:

It was put to the claimant that when he asked/ offered to be made redundant he was told by ED that it would be hard to get another job. The claimant denied that happened.

Respondent's case:

The Tribunal heard evidence from ED. He explained that on 31st August 2009, they had to let three employees go because of a downturn in business. They were two general operatives and one electrician. The claimant approached him and asked him if he could go. He tried to dissuade the claimant because it would be hard for him to secure other employment. The claimant told him that he wanted redundancy, that he wanted to leave. He told the claimant that he would have to ask JD (IF JD wished to stay rather than take redundancy). He asked JD and JD agreed to stay, so the claimant took JD's place for the redundancy place.

The witness was asked if he took the claimant's van and he replied, "Absolutely not". He was asked if he was stating that the conversation did not take place about the van and he replied, "Absolutely, he just said that he wanted redundancy", "I said to him are you mad, why would you want to leave there are no jobs out there", "He said no, he just wanted the redundancy).

The witness explained that he tried to persuade the claimant to stay, that they wanted to keep the claimant. The claimant was never going to lose the van

Determination:

Rightly or wrongly the claimant formed the impression that his company van was being taken from him. The claimant, on foot of this understanding, which in his view made the job impossible, sought to be made redundant. The employer says that the request to be made redundant came out of the blue and yet did nothing to understand why the claimant had made this decision so unexpectedly. The Tribunal considers that at this point the employer should have refused the claimant's application for redundancy and allowed a "cooling – off" period to ensure that the claimant knew that the decision was the right one. After all, regardless of whether or not the issue of the van was raised, the topic of redundancy had only been introduced into the workplace on that very day and an application for voluntary redundancy from the claimant would have to have been at the very least seen as a rash and ill-thought out decision.

The Tribunal notes that the respondent rejected the suggestion that use of the van was being taken from the claimant and that this issue had never been raised with the respondent at the time of the application for redundancy. In the interest of fairness the Tribunal heard the claimant give his evidence and adjudged that his case had been incorrectly described as a case of unfair selection for redundancy and was instead a case more appropriately described as a case of constructive dismissal- in which case the burden of proof switched to the claimant.

In circumstances where the claimant seeks to make a case for constructive dismissal the onus rests with the claimant to show that he had no option other than to tender his resignation. The Tribunal accepts that the removal of the van struck at the heart of the contract of employment as the claimant had enjoyed a valuable benefit in having an insured, taxed and fuelled mode of transport at his disposal and this was now been removed forthwith. However, the claimant's immediate request for voluntary redundancy was not a considered one as he had not taken the time to reflect on the implication of being without transport and what alternatives were open to him. Again the claimant needed more time before he could possibly have been making a rational decision.

On balance the Tribunal finds that the claimant was constructively dismissed insofar as he believed the material change in his employment terms meant he could not continue working with the respondent company and that there was certainly a breakdown in communications between employer and employee. However the constructive dismissal was made easier for the claimant to opt for by reason of the availability of a redundancy package – it is doubtful that he would have resigned had there not been a redundancy package to take.

The Tribunal finds that almost no effort has been made to find alternative employment and accordingly award a sum of €8,000.00, less the redundancy amount already paid, under the Unfair Dismissal Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

