

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE -*Claimant*

CASE NO.
UD2304/2009
RP2633/2009

against
EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. J. Browne
 Ms. S. Kelly

heard this claim at Wexford on 5th May 2011 and 14th October 2011

Representation:

Claimant: Ms. Barbara Mebtouche, TRIANA,
 Independent Advice & Information Bureau,
 13 Store Street, Dublin 1

Respondent: Ms. Julie Breen, Garahy Breen & Co, Solicitors,
 4 Castle Street, Enniscorthy, Co Wexford

The determination of the Tribunal was as follows

Dismissal was in dispute in this case.

Summary of the Evidence

The respondent company has been in operation for 28 years. Its business is the manufacture of timber products for the timber trade. The claimant commenced work with the company in 2005 as a carpenter. The parties enjoyed a very good working relationship during the employment until the events herein. They had often helped one another out in personal matters. The claimant's skills were highly regarded by the respondent, who had helped the claimant out in a number of ways. There was a downturn in the business throughout 2009 which necessitated putting employees on short-time in late August.

On or around 19 August 2009 the respondent's managing director (MD) asked the claimant to

go on to a two/three-day week and he refused as he had a family to keep and bills to pay. On 26 August MD told him and his fellow employee (FE) that the business was in a bad way and they would get their P45s in a week. On 28 August 2009 MD gave the employees a letter informing them that there were to be lay-offs for a limited period. However, MD told the claimant and a fellow employee (FE) not to worry that they would get their P45s in a week.

On 4 September 2009 MD called the claimant to his office and told him that while the business was in trouble he would like to maintain him in employment but would have to reduce his rate of pay from €14 to €12 per hour. The claimant was only willing to consider the offer if this was the only change to the terms of his employment and he had that condition confirmed to him a number of times by MD. Having discussed the matter with his wife the claimant agreed to continue in the employment at the lower rate of pay.

It was MD's understanding, based on advice received from a labour inspector that any change to the terms of employment, no matter how small, had to be reflected in a new contract and that a contract must be signed. Based on this advice MD prepared a new contract. However, as well as reflecting the change to the hourly rate of pay the new contract stated that the claimant's position was "temporary-depending on orders" whereas the claimant's previous contract had stated his position was "permanent." MD explained that the phrase "temporary-depending on orders" meant that the company would employ the claimant for as long as it had work for him.

On Monday, 7 September 2009, MD presented the new contract to the claimant. It was the claimant's position, which was denied by the MD, that when he queried the changed status of his employment MD told him it was the only contract available and that if he did not sign it within the week that he could not work for him anymore. The claimant was unhappy about the change and refused to sign the new contract. MD's position, which was denied by the claimant, was that he explained to the claimant that he could not use the word permanent during the recession because the business was dependent on getting orders and he did not know how it would go. MD further explained to the claimant that should there be a further inspection by the National Employment Rights Authority the respondent could face a large fine if the contracts were incorrect.

The issue of signing the contract was again raised between the parties at the end of the week's work on 11 September 2009 in the office but neither party changed his position. The claimant's version of their conversation was that it was the only contract that he would get and if he did not accept it he was dismissed from Monday. He was also told that he would get his P45 in a week. MD's position was that the claimant was a good worker and he did not want to lose him; the claimant would be the last employee he would let go.

MD's version of the events of 11 September was that the claimant refused to sign the contract and requested his P45. MD's wife who was present in the office at the time of the conversation between the parties confirmed that the claimant had said he would not sign the contract, that he was leaving the employment and asked for his P45. After processing the wages the following week, she prepared the claimant's P45 which he subsequently collected. The claimant denied that MD's wife had been present in the office at the time of his conversation with MD. The claimant further denied that he had just demanded his P45 but when he was told he was dismissed he did ask if he could go in to collect it.

Determination:

There was a dispute between the parties as to whether the claimant resigned from his position or was dismissed by MD on 11 September 2009.

The claimant had agreed to a decrease in his hourly rate of pay on condition that would be no other change to his contract of employment. On receipt of the new contract on 7 September an issue arose between the parties because of the inclusion of the term describing the claimant's position as "temporary - depending on orders" in the new contract, which in his previous contract had been described as permanent. The claimant refused to sign the contract. The Tribunal accepts MD's evidence that he explained to the claimant that his business was dependent on getting orders, as accordingly was the claimant's continuity of employment with the respondent. The Tribunal further accepts MD's version of the conversation between the parties in the office on 11 September. This evidence was corroborated by MD's wife. Accordingly, the Tribunal finds that the claimant resigned from his employment. Thus, the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

While the claim for redundancy was withdrawn at the outset of the hearing the Tribunal wishes to point out that had such a claim been before the Tribunal it would similarly have failed as there was no dismissal and in any event the claimant's position was not redundant as the respondent had to take back another employee to fill the claimant's position..

While there was not a claim for constructive dismissal before the Tribunal it none the less wishes to state that the word permanent in a contract of employment does not mean a job for life, for instance an employer is entitled to make an employee redundant when there is no longer work available for him. Thus, such a change when explained to the claimant was not so fundamental as would have entitled the claimant to resign and claim constructive dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)