

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

- claimant

CASE NO:
UD2164/2009
MN2007/2009

against

EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. J. O'Leary B.L.

Members: Mr. M. J. Murphy
Mr. O. Nulty

heard this appeal at Cavan on 27 January 2011
and 10 November 2011

Representation:

Claimant: Ms. Lorna Lynch BL instructed by:
Phelan Brannigan, Solicitors, Teach Na Crúinne, Dyer Street, Drogheda,
Co. Louth

Respondent: Mr. Graeme Murray, Solicitor, 77, Knocknashee, Dublin 14

Claimant's Case

The claimant commenced employment on the 1st of February 2007 as a production graphic designer for a newspaper (AC). The claimant was involved in putting the newspapers advertising together and producing the paper. The claimant's employment was based in Cavan. The respondent had three newspapers which all operated separately. In late 2007 the staff were informed that the production element of the newspapers were going to be centralised in Mullingar. The claimant told his manager, the Managing Editor (JoH) that he was not interested in the production job in Mullingar. Following a meeting on the 8th of February 2008 alternative jobs were advertised to all the staff. One of the roles was as sub-editor based in Cavan. The claimant expressed an interest in this role to JoH who responded by telling him it shouldn't be a problem and that on the job training would be provided.

The claimant attended the interview and was successful in securing the position as sub-editor. The claimant attended a couple of days of basic training in Mullingar which included a few tests; the claimant does not believe he did very well but the job offer was never retracted. He commenced his new position and received a corresponding salary increase in mid 2008. He was aware that the production work was being generally outsourced so was happy to be part of the more secure editorial staff. The claimant received no further training for his new position, instead was required to train the staff in production. It transpired that the claimant did very little sub-editing work; it was never given to him. He raised this issue with his editor (LoR) on a regular basis, the response was always that 'everyone is busy it'll get there.' The claimant was kept very busy with the production work on the paper.

A memo was circulated to the staff saying that all production staff would be going on a 3-day week, the claimant was listed as one of the 'production staff' that would be going on a 3-day week. The claimant raised the issue with LoR, He said his name should not be on the list, she responded saying would do her best to keep him on a 5-day week. The claimant had been a member of the production union but moved to the NUJ when he commenced his new role as sub-editor. The claimant does not re-call a conversation suggesting that a 3-day week would suit him.

After consultation with his Union the claimant invoked the grievance procedure. The claimant never received a contract of employment or the staff handbook. The first meeting was held on the 18th of June 2009. It emerged that the respondent was denying that the claimant was in the role of sub-editor. The claimant was aware that his 'reports' were not great but expected and was assured that he would receive further training, and not to 'fret'. The claimant was aware that he would be helping out initially in production but his new role was not created to avoid redundancy. The result of that meeting was that the claimant was reduced to a 3-day week as the respondent had designated him as production staff.

The claimant appealed this decision. The appeal meeting took place on the 15th of July 2009. The claimant had never heard of a 'production sub-editor' role as contained in the written appeal decision. The claimant was given a salary increase because he commenced in the new role, not because 'he was always asking.' The claimant received the appeal decision dated the 22nd of July stating that the appeal was unsuccessful. This had a severe impact on the claimant's health. On his return from scheduled annual leave in August the claimant took sick leave due to the situation in work. Previously sick pay had been paid to the claimant but on this occasion it wasn't paid. The claimant contacted the respondent and was informed that the payment of sick pay was discretionary. The claimant resigned his employment by letter dated the 8th of September 2009. The claimant gave evidence of Loss.

Respondent's Case:

The editor (LoR) of the AC gave evidence. LoR commenced as the News Editor in February 2008 and then got promoted when the Managing Editor role was divided. LoR was informed by JoH that there would be redundancies but that they were trying to retain two positions. She was informed that the claimant and another were going through the assessment process and would be in the role of 'production sub.' It was never brought to LoR's attention that the claimant was supposed to be doing sub-editor work. LoR received an e-mail from the claimant during the grievance process requesting additional training, which she referred to FM and he did request 'more pages' during the grievance process. The claimant

returned to work on the 4th of August following the grievance procedure completion. He did not complain about the lack of sick pay to this witness; she is not aware of anyone else not being paid sick pay.

LoR was aware that the claimant was kept on after all the production staff were made redundant; she was not aware of what role he was given. The retention of one production person would have had serious implications throughout the rest of the respondent group.

On the second day of the hearing the Director of Operations for Publishing (FM) gave evidence. The respondent company was involved in publishing and had four sites. The claimant was employed in Cavan as a member of the Pre-Press team. He was an excellent employee in Pre-Press and the witness had known him while working on other newspapers in the past. They had a good working relationship.

Business began to decline and it was decided to move the Pre-Press team to a central location in the Mullingar premises. Seven roles in the Pre-Press team in Cavan were to be made redundant but the Managing Editor (JOH) wanted one position to remain locally. He spoke to the claimant about the matter. An advertisement was placed for the position for Sub-Editor. Two staff, including the claimant, and five staff from the Navan premises applied for a similar role. Appraisals were held of each staff member by a Journalist (PW) before they were interviewed for the role. The claimant's score was the lowest. A colleague of the claimant (SW) was offered the position in Cavan but later decided not to take it. The position was offered to the claimant. PW who had overseen the appraisals told the witness that the claimant would not need any further training in the role of Sub-Editor, as he would not have the capability to carry out all the tasks involved. The claimant continued to carry out the tasks he had in the past as Pre-Press and another Journalist was hired to complete the experienced tasks.

In April 2009 the company needed more cost reduction, over 3 years business had declined 50%. Talks were held with unions. It was decided that the Pre-Press staff would be put on a 3-day week. He spoke to the claimant around the end of April 2009 about the costs reduction required and the company was looking for staff to volunteer to go on a 3-day week. The claimant replied that it would suit him, as he was involved in another business.

On June 26th 2009 the witness informed the claimant that his hours, and therefore his wages, would be reduced to 3 days from June 15th 2009. The claimant made no complaint to the witness but went to the Editor to invoke the grievance procedure. On June 26th 2009 the witness heard an adjudication hearing with the claimant. A member of the NUJ union (NC) attended with him. The witness told the Tribunal that he found this strange as the claimant was a member of the UNITE union. The witness went through what had occurred with the claimant since he had taken up the role of Sub-Editor. Having listened to what the claimant and his representative said at the meeting that the claimant would move to a 3-day week but would remain working his full working week until the adjudication and any appeals procedure was carried out.

On July 22nd 2009 the Financial Director (FL) heard the claimant's appeal to the decision who upheld the decision the claimant would commence a 3-day week like the other staff in Pre-Press. The claimant went on annual leave and returned on August 4th 2009. On August 7th 2009 the witness emailed the claimant informing him he was going on a 3-day week. On August 10th 2009 the claimant was absent on a week's sick leave due to work

related stress. He was expected to return to work on August 17th 2009. The witness attended the Cavanoffice to speak to the claimant about the matter and was informed by the Editor that theclaimant had texted the previous evening to say he would be out for a further period on sickleave.

On August 21st 2009 the witness emailed the claimant. He told him he hoped that he was feeling better and outlined the time line of what had occurred since the claimant had lodged his grievance and the adjudication and appeal hearings that had taken place. He confirmed his period of sick leave was unpaid and that any deviation was solely at the discretion of the Manager concerned. He also stated he was also looking forward to see the claimant back at his desk.

When asked he said that he had mentioned the fact he was not being paid for his period of sick leave as the claimant had contacted the payroll department the 15th August 2009 to ask why he had not been paid. The witness told the Tribunal that it was unfortunate he had tohear it in this manner. When asked who had decided why the claimant would not be paidwhile on sick leave he replied that the Editor had decided but he had made the ultimate decision on his “institution”. Other staff had not been paid in the past and every case wasmade on a case-by-case basis. On September 8th 2009 he received a letter from the claimant’s solicitor stating that under the circumstances that the claimant’s hours were being reducedand that he had indicated that it was being done as the claimant had not been employed as aSub-Editor.

On cross-examination he agreed the claimant had been paid at a higher salary in his new position. He was aware PW had informed the claimant that he could receive further training in the new role and it had stated it the advertisement in the role but PW had told him there was no point as the claimant had his limitations. He stated that he had informed the claimant that the role was Pre-Press a few days after he took up the role. They spoke about five times about how he was getting on and the claimant replied it was fine. It had been made clear to the claimant he was a member of the Pre-Press team. The claimant was not given a contract of employment or a written contract of any change in his terms and conditions of employment. He was aware of the legislation concerning the Terms of Employment (Information) Act, 1994 to 2001.

When asked he said that the Editor (LOR) had been present when the claimant had first said a 3-day working week would suit him. The claimant’s representative refuted she had stated this in her evidence given on the first day of this hearing. When put to him the witness stated that the claimant had refused to work Fridays but had worked a few half days under duress.

The witness explained that there had been a draft company handbook given to union representatives, which included the grievance procedure but that it had not been agreed. When put to him that it was highly inappropriate for the witness to hear the adjudication hearing having told the claimant a number of days he was to commence a 3-day week, he replied that the claimant nor his union representative had raised an objection.

He explained that before the appeal hearing FL had called him to ask about the claimant’s contract as the matter had been raised at the adjudication hearing. This was the only conversation they had concerning the matter. No further internal appeals hearings were held. When he received the claimant’s solicitors letter he contacted the respondent’s solicitor.

The Financial Director (FL) who heard the claimant's appeal of the adjudication decision gave evidence.

He told the Tribunal that he had approached the hearing with an open mind. He had perused the minutes from the adjudication hearing and the role set out for the Sub-Editor position. His conclusion was that the claimant was part of the Pre-Press team and he should work a 3-day week like his colleagues. He also made one call to FM to discuss what had been discussed at the first hearing regarding a contract of employment. He also made a call to JOH to clarify some issues. No complaint was raised as to how or who had held the adjudication hearing.

On cross-examination he explained that as there was a small management team there was an agreement between FM and himself that if one person heard the adjudication hearing the other would hear any appeal. He told the Tribunal that he had heard an appeal in the past and had ruled against the first decision at the adjudication hearing and went against the company. The claimant had not requested any training in his new role. He felt it was a fair and impartial hearing.

Determination:

The Tribunal having carefully considered the sworn evidence and submissions adduced by both parties over two days in this case, finds that it was reasonable for the claimant to believe that the position of Sub-Editor at the respondent's premises in Cavan was his true title and he was not a part of the Pre-Press Production team, like his colleagues who had been moved to a central location of Mullingar and who had been put on a 3-day week. As a member of the editorial team he would be protected from his working hours being cut. The Tribunal finds, in view of the above that the claimant had no alternative but to leave his employment and find that he was constructively dismissed.

Accordingly, the Tribunal awards the sum of € 12,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed, as this is a case of constructive dismissal.

Sealed with the seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)