

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE

UD1146/2010
WT478/2010

against
EMPLOYER

under

ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Harrington
Members: Mr. P. Casey
Mr. D. McEvoy

heard this claim at Cork on 13th September 2011 and 28th November 2011

Representation:

Claimant:
McNulty Boylan & Partners, Solicitors,
Clarke's Bridge House, Hanover Street, Cork

Respondent:
Ms. Sinead Casey, Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

Background

- 1 The Claimant commenced employment with the Respondent on or about 1st February 2008 and resigned by letter issued on 23rd June 2010 and received by his employer on or about 24th June 2010.
- 2 The Claimant was employed as a Sales Executive with the Respondent company, which is a supplier of electrical equipment.
- 3 The Claimant stated that he enjoyed a good relationship with his immediate supervisor, the Branch Manager.
- 4 The Claimant stated that difficulties arose following events in the last week of April 2010, when all employees of the Respondent company, including the Claimant, were

expected to partake in the annual stocktake which took place on 30th April.

- 5 The Claimant maintained that he was unable to partake in the annual stocktake due to illness.
- 6 The Branch Manager suspected that the Claimant had in fact attended a wedding on that date as he had previously sought and been refused permission to take time off to attend the wedding.
- 7 On 30th April, the Branch Manager drove to the Claimant's home (at some considerable distance) for the stated purpose of checking the mileage on the Claimant's company car for the purposes of completing the stocktake. When he called to the house, he rang the doorbell and did not receive any reply from the Claimant. He noted that there was a light on in the Claimant's house which he believed signalled that the Claimant was absent from the building.
- 8 A meeting took place between the Claimant and the Branch Manager on the following week on 4th May 2010. The Claimant alleged that at that meeting the Branch Manager called him a liar and in particular that the Branch Manager said he "knew a liar when he saw one". The Claimant further alleged that the Branch Manager lost his temper and came around the desk and charged at him with his shoulder into his chest with force.
- 9 The Branch Manager denied that any physical assault took place and said at most he may have brushed against the Claimant's coat. The Branch Manager did acknowledge that he told the Claimant that he did not believe him.
- 10 The Claimant alleged that following the meeting he ran out the door and was in a terrible state.
- 11 The Claimant subsequently made a complaint to the Respondent's General Manager and to the Health and Safety Authority.
- 12 The Claimant said that following his making of the complaint to the General Manager, the Branch Manager phoned him and told him "it's a dangerous game you are playing trying to get your boss into trouble". The Branch Manager denied any threat was made to his subordinate.

Hearing

- 1 Evidence was given by the Claimant, the Branch Manager, the new Group Manager and by a fellow employee.
- 2 There were numerous conflicts of evidence. In respect of the core issues as outlined by the Claimant, the Tribunal notes as follows:

A Prior conduct

- i The Claimant maintained that he enjoyed an excellent record as a salesman and that the Branch Manager had wrongly taken credit on two occasions for sales figures which had been achieved by the Claimant,

despite the Claimant having protested on the first occasion.

The Branch Manager acknowledged that the discrepancy had occurred, but stated this had occurred at Head Office and there was no reason for him to do so as there was no gain to him. Moreover, it was he who had sought the error to be corrected as soon as it was pointed out.

- ii The Claimant said that the Branch Manager had previously suggested to him that he was not in the right job. The Branch Manager disputed this, but did acknowledge that the Claimant had not helped out on various occasions when other employees were prepared to do so, when the Claimant had protested that he needed to protect his suit.

B Date of stocktake

- i There was no dispute that it was an important date for everyone in the company to attend.
- ii It was not disputed that the Claimant sought permission to attend a wedding.
- iii The Branch Manager maintained that the Claimant was disappointed that permission was refused and had stated that his girlfriend had acquired a new dress for the occasion. The Claimant denied that he had said this, asserting that the invitation was in fact to him alone in his sole name.
- iv It was a common case that the Claimant had been absent the preceding day from work when the Claimant had reported that he had been ill.
- v The Claimant stated he stayed at home for the entire day of the stocktake, but went alone to the wedding for a short period after 6.00pm so as to give his best wishes and a present to the couple.
- vi The Branch Manager stated that on the day of the stocktake, he called to the Claimant's house and the lights were on which he took to be evidence of the Claimant being at home.
- vii The Branch Manager said that it was necessary for him to travel to the Claimant's house so as to take a mileage reading. The Claimant disputed this saying that monthly figures were handed in by all Sales executives and therefore such a trip was totally unnecessary.

C Meeting of 4th May

- i The Claimant characterised the meeting as heated. He said he was shaken following the meeting.
- ii The Branch Manager denied the meeting was heated although he acknowledged that he had told the Claimant that he did not believe his account.

- iii A fellow employee gave evidence of having arrived at the end of the meeting as the door was opened. He said he had not heard raised voices prior to the door being opened and he considered the Claimant to be calm when he met him in the Branch Manager's office at the conclusion of the meeting.

D Complaint

- i The Claimant stated he was so shaken that he made a complaint to the then Group Manager. That Group Manager moved on from the position and a new Group Manager assumed the position.
- ii The Claimant confirmed that he also made a complaint of bullying to the Health and Safety Authority.

E Subsequent call from immediate Manager

The Claimant said that having made the complaint, the reaction of the person about whom he made the complaint (i.e. the Branch Manager) was to phone him and accuse him and threaten him. The Branch Manager acknowledged making a phone-call but denied it was in any way threatening.

F Sick Pay Scheme

- i Following the meeting of 4th May and his complaint, the new Group Manager wrote to the Claimant by letter dated 11th May 2010. The Claimant noted that this letter stated inter alia the following:

“Please note that we require the specific nature of illness to be recorded on Medical Certificates”.

If your absence is continuing, you must telephone your Manager on the first day of each week in which you are absent Failure to comply with any of the terms of Sick Leave Policy may result in disciplinary action (up to and including dismissal).

Under the terms of the Sick Leave Policy, the payment of sick pay is at the absolute discretion of the employer.”

The Group Manager's letter then stated that he had “reviewed your sick absence record and noted that in the current leave year you have been absent on sick leave on the following dates: 19th/26th April inclusive, 29th/30th April, 7th/10th May. Having regard to the fact that (the employer) has paid you sick pay during these frequent, intermittent absences to date, I must advise you that (the employer) will be exercising its discretion not to pay you sick pay for the period of your current absence”.

- ii The Claimant's legal representative submitted that the Company

Rules and Procedures for Sickness and Injury do state that they are at the absolute discretion of the company, but exclusions from the company discretionary sickness/injury payments policy did not include illness of the nature of which he was complaining (in passing, the Tribunal notes that notwithstanding these exclusions, it remained at all times a discretionary policy).

- iii The Claimant maintained that the letter he received was in effect a response to his complaint and not alone was sick pay withdrawn, he was forced to make reports to the Branch Manager (whom he said was causing him illness) and he further complained that he had been threatened with disciplinary action.
- iv In response, the new Group Manager said that he was simply giving the Claimant proper notice of the procedures where complete sick certificates were not being furnished and, he said, the employer wanted to know what was the Claimant's situation.

F Resignation

- i The Respondent noted that the first notice received of the resignation was by letter of 23rd June 2010 from the Claimant's Solicitors (presumably received on 24th June 2010). Counsel for the Respondent submitted that the Claimant had failed to comply with the requirement to invoke and follow the grievance procedure and had failed to utilise the grievance procedure up to and following his resignation.
- ii Counsel for the Respondent noted that by letter of 13th May 2010 the new Group Manager had notified the Claimant that it treats complaints of the nature made very seriously. On 14th May 2010, the Claimant had confirmed that he would like to meet with the new Group Manager to put down on record a formal complaint and the Claimant had stated that he hoped to return to work the following Monday. On 15th May, the new Group Manager wrote to the Claimant explaining to him that the first stage of the formal procedure is to make a complaint in writing and he asked for that written complaint to be provided by Thursday, 20th May 2010. The Claimant wrote on 17th May 2010 saying he would reply in writing by Thursday, 20th May.
- iii No written complaint was ever made by the Claimant. The Claimant alleged that he had never been furnished with nor had he ever seen the relevant company policy. The Respondent maintained that it was readily available, including on the company Intranet, but that in any event the letter of 15th May clearly set out that a written complaint was required.
- iv Following the Claimant's resignation, the Respondent's solicitors wrote to the Claimant's Solicitors on 2nd July inviting the Claimant to reconsider his decision to resign from his employment and also making the point that the Claimant had never submitted a formal written complaint. Moreover, the Respondent's solicitors

confirmed that the employer remained willing to investigate the complaint against the Claimant's Manager.

- v In response, the Claimant's Solicitor stated that the Claimant's health had suffered greatly as a result of what had happened to him during the course of his employment and the Claimant did not wish to reconsider his position.

Determination

The onus of proof in a constructive dismissal case rests with the Claimant, who must prove the behaviour of the employer justified his action in resigning. The burden is onerous. Moreover, Counsel for the Respondent placed reliance on *Conway .v. Ulster Bank Ltd (UD474/1981)* in which the employee resigned his position without fully engaging with the Respondent company's grievance procedures in order to resolve his difficulties.

The Tribunal considered whether it was reasonable for the Claimant in these particular circumstances not to exhaust available procedures. In essence, the Claimant's case was that he was not required to do so for the following reasons:

- i Having lodged a complaint, the person against whom he had made a complaint of bullying in fact telephoned him and threatened him (the phone call was admitted though there was a denial of any threat).
- ii The Respondent had wrongly accused him of having a poor sickness record (whereas in fact he had only become ill over the previous two to three weeks) and had cut him from the Sick Pay Scheme, which in effect he argued was a response to the complaint he had made.
- iii No meaningful effort was made by the Respondent to follow up with him in relation to his failure to provide a written complaint, notwithstanding the fact that the Respondent's own occupational physician had advised the Respondent, following a medical examination on 11th June 2010, that he was unfit for work for a further four to six weeks. The Claimant's solicitor argued that the illness was caused by the actions of the Respondent, though the Tribunal noted that no medical evidence was adduced by either side.
- iv The letter withdrawing sick pay also threatened him with disciplinary action if he did not file complete Sick Certificates.

The Tribunal finds, having regard to all the facts in this particular case, that the Claimant's termination of his employment constitutes constructive dismissal within the meaning of the Unfair Dismissal Act. However, the Tribunal finds that the Claimant substantially contributed to his constructive dismissal, taking into account the fact that he had agreed to submit a written complaint and never indicated that he would not do so, and had resigned without giving the employer any notice of his dissatisfaction.

The Claimant gave evidence that he was out of work from 24th June 2010 to 7th January 2011 and had been earning €36,500 per annum at the time of his resignation.

The Tribunal awards the Claimant €6,500 under the Unfair Dismissals Acts, 1977 to 2007.

No evidence was adduced in respect of the appeal under the Organisation of Working Time Act, 1997 and therefore this that appeal was dismissed for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)