

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD1329/2009

against

EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr T. Gill
Mr T. Kelly

heard this claim at Nenagh on 12th July 2010, 28th September 2010, 29th September 2010
7th December 2010, 8th December 2010 and 18th November 2011

Representation:

Claimant: Mr Brendan Hyland, B. Hyland & Co., Solicitors, Luttrell House, Castle
Street, Roscrea, Co. Tipperary

Respondent: Mr Liam Campion Managing Director

The determination of the Tribunal was as follows:

At the commencement of the hearing the claimant's representative applied to change the claim under the Unfair Dismissals Acts from one of constructive dismissal to direct dismissal. The respondent denied dismissing the claimant. The Tribunal decided to hear the entire evidence. As the issue of dismissal was in dispute the onus of proof lay on the claimant to establish that there was a dismissal.

Summary of the Evidence

The respondent company manufactures and supplies concrete products for the farming and the construction industry. The claimant commenced employment with the respondent in June 1992, working in production but left in early 2003 for some months after which he resumed his employment with the respondent. It was the claimant's position that during the break in his employment he had worked several hours each week, without pay, for the

respondent, helping to work a pipe machine and that the respondent was “on his bended knees” to him to come back to work. It was the respondent’s position that during the break he had only seen the claimant around four times and that he had been seeking to return to the employment.

The business grew and at its height the respondent had up to 70 employees but by July 2010 the number had reduced to four or five employees. As the business had expanded the respondent became involved in laying concrete floors and the claimant left his production role and went on the road selling and laying floors. Latterly, he returned to production as production manager. The respondent lost a massive amount of money in the flooring venture.

The claimant’s position was that he had devoted over 16 years of his life to the respondent’s business, burying himself in it and working far beyond the standard hours although he was not paid overtime. He maintained that he had played a major role in the development of the business. He saw his friends driving around in company cars while he had an old broken down van. The managing director (MD) had promised him a site in a nearby town if he remained working with him but he was never given the site. Another employee gave evidence that MD had promised him a house. MD denied having made any such promises and pointed out that the said promises had been allegedly made years before he had bought land in the particular town.

On or around 1st December 2008 it was discovered that the machine for pouring concrete had not been cleaned the previous day. According to the claimant while he was in the shed with a foreman (FM), who was cleaning the machine, MD came into the shed in an unbelievable rage, roaring and shouting at him because the machine had not been cleaned, giving him a few pushes and pulling him towards the machine. MD asked one of the workers to get him the lump hammer and the claimant thought he was going to kill him. FM stepped between them to diffuse the situation. Another employee (AX) gave evidence that he saw MD grab the claimant by the jacket while roaring and screaming at him and the claimant falling backwards; when MD left the claimant was shaking and pale. Under cross-examination AX agreed that he was approximately 150 metres away from the incident at the time of the incident but it was impossible not to hear the shouting. He did not see anyone with a lump hammer on that occasion.

MD explained that he was frustrated when he discovered that the machine, which cost over €500,000, had not been cleaned the previous day. It was only because FM needed to use the machine that they discovered it had not been cleaned. Failure to clean the machine could result in the concrete solidifying and the machine being written off. The claimant has failed to clean it. He had not asked anyone to get a lump hammer so he could hit the claimant and thought this was an “unbelievable accusation”. According to FM, who was present during the entire incident and heard and saw everything, the claimant and respondent were two metres apart, there was no pushing or pulling, he was between both men and there was no mention of a lump hammer.

The claimant’s position was that for some time before this he had physical symptoms including a pain in his right arm and neck, blindness and diarrhoea and it is only now he realises that these were due to his being bullied by MD. He was often crying because he had been treated so badly by MD. He generally worked some of his holidays (both summer and Christmas) but did not receive any pay for this and he now realises that he had been “a stupid man”. He was very upset over Christmas 2008 and did not get out of bed for the opening of

his children's presents on Christmas Day, which was corroborated by his wife (CW). The claimant attended the work Christmas party.

The claimant also did some work with a local undertaker, with whom he had lived when he first moved to the area some 20 years earlier. According to MD he had agreed with the claimant that he could do undertaking work between the hours of 11.00am and 1.00pm and he was to let management know when he was leaving and make up these hours. According to the claimant he could do this work when required but he was to organise the work before he left to do the undertaking work. The claimant also worked for the undertaker outside his normal working hours with the respondent. There was a dispute between the parties as to the amount of time spent by the claimant on this work. According to the funeral director the claimant had only helped with five funerals, amounting to approximately three working days. The claimant had to stay away overnight on two occasions. Towards the end of 2008 the funeral director noticed a change in the claimant's personality: he became more aloof from people and he failed to attend for a funeral on one occasion. On inquiring as to what was the matter with him, the claimant broke down and told him it was due to his work situation with the respondent. He received three telephone calls from MD, telling him that the claimant would destroy his good name as a funeral director and suggesting he replace the claimant with another person. The funeral director was shocked at the MD's hatred for the claimant. After the third phone call he no longer accepted MD's calls. MD rejected the majority of this evidence. He recalled telephoning the funeral director only on two occasions and the funeral director had twisted the conversations they had. According to MD the claimant at this point was in perfect health, his only problem being that he needed to concentrate on one job not four.

The claimant was asked, by the family of a young mother (a friend of his sister) who had died to provide undertaking services on 12th January 2009. This resulted in his having to leave sometime between 4.30pm and 5.30pm on 12th January 2009 and involved an unanticipated overnight stay in Tralee. The claimant's case was that he returned to work after lunch the next day. The respondent's position was that MD was speaking to the claimant around 5.40pm on 12th January 2009 and he did not mention the funeral and none of the members of management saw him at work on the afternoon of 13 January 2009. He did not answer a call to his mobile from MD because he would only be abusing him but he had answered a later call from him. The claimant maintained that, after Christmas, he sought a meeting with MD.

It was MD's evidence that for the majority of his time with the respondent the claimant was a top class employee, a great worker, loyal and flexible and was the closest and most trusted employee he had. They discussed ideas put forward by the claimant and MD's future plans for the business. The claimant had gone to Germany with him when he was buying large new plant. The evidence of the respondent's book-keeper (BK), who also oversaw HR matters, was that the claimant was "the best in the world" but he could not handle change, it was next to impossible to get paper-work from him; he was respected by the employees and wanted to be their friend. He did not clock in or out of work.

According to MD it was the claimant's time working outside the plant laying floors that led to his problems. On his return to working in production problems arose and MD noticed the claimant was focusing a lot on his other businesses (undertaking, embalming, collecting bodies and making gates). He was not getting the support he needed from the claimant as his production manager. Wanting to avoid aggravation he was overlooking the

issues but when it came to a situation where the claimant did not want to accept what he said it forced MD to call a meeting with the claimant on 16th January 2009 to discuss his concerns about his performance. These included *inter alia* not being contactable during work hours, his funeral work, embalming and collecting bodies, his failure to produce production sheets which was causing a problem with costing the products, his control over the workers, timekeeping (he was starting work some 35 minutes late), carrying his children in the van and having the baby seat in the front of his company van which insurance would not cover, and his failure to record goods sold in the yard (the respondent only receiving payment because the customers were honest enough to come in and pay). It was common case that at the meeting the claimant agreed that he did not want to continue as production manager. It was MD's position that meeting was not heated. MD maintained that he offered the claimant maintenance and welding duties on a full-time basis and that neither redundancy nor working a three-day week was mentioned. After the meeting they visited a quarry some miles away to discuss the progression of work on it for upcoming work on a motorway.

It was the claimant's position that the respondent came in to the meeting with a book, slapped it down in a rage and said to him, "You're no f***** good. You're f***** never here. You never answer your phone. I'm going down the redundancy route with you. I'm giving you 16 years. I know you left me for a while but you helped me and I am grateful". The respondent then continued to talk to him in an abusive manner about his funeral work and his other work. MD offered him work as a fitter on a three-day week basis. He understood he was sacked. He was devastated. After the meeting MD told him he had to go to the quarry with him and although he was uncomfortable with this he went along. MD spent about 15 miles of this journey on his mobile. He told his wife that evening that he had received his redundancy notice. He was upset and agitated. This was a big blow for them as they needed both incomes. He did not speak further to his wife (CW) during the weekend and just cried in front of her. CW confirmed the claimant had cried uncontrollably for a number of days and she was concerned for his safety at this time.

The claimant came to the workplace as usual the following Monday. His position was that he went in to collect his things. He could not tell BK or FM that he was leaving so he told BK he was doing a funeral; this was denied by BK. Later that day he was shaking, had a pain down his arm and found it difficult to hold the steering. When he visited his GP she told him he was severely depressed. MD and BK understood the claimant had reported for work that Monday. When he left, around lunch-time, he took the company van and mobile phone with him.

The claimant did not show up for work on Tuesday or Wednesday morning. On Wednesday (CW) telephoned MD, apologising for the claimant's absence and saying she did not know what was up with him. Some three or four weeks later a number of medical certificates were handed in.

CW's evidence was that she phoned MD in the first week of February 2009 to talk to him about the redundancy and again spoke to him about it at Easter and he agreed to call out to their home but he neither called out nor sent the redundancy form. MD explained that, having received legal advice, he did not call out to the claimant's home.

Between 19th January 2009 and 19th May 2009 the claimant submitted medical certificates to the respondent as he was attending a doctor and a counsellor. He submitted these certificates

as he was unclear as to his position with the respondent company. The certificates state that the claimant was suffering “stress reaction”. The respondent had not sought the medical certificates from the claimant and it never does from its employee as the respondent does not pay employees while out on sick leave. According to CW she delivered medical certificates to MD’s wife some time in March 2009 and asked for MD to telephone her. Over a week later she telephoned BK, who told her that the redundancy lump sum had been calculated and that it was €20,490.

BK’s evidence was that she believed that the claimant was on sick leave from 19th January. MD had not told her, following the meeting of 19th January 2009, that the claimant had been made redundant or asked her to prepare redundancy papers for him or do a letter stating that he was dismissed. When another employee’s van broke down the respondent instructed him to get a loan of the company van from the claimant and it was returned to him a day later. The claimant had continued to use the company mobile phone while absent and between 19th January and 4th February 2009 had made around 150 mobile calls, few if any were business calls. BK accepted she had calculated a lump sum redundancy payment based on the claimant’s service but she has done so online, while CW was on the phone and at her request.

At his counsellor’s suggestion the claimant phoned MD and arranged a meeting. They met on 1st May 2009 and went for something to eat. According to the claimant MD spoke to him about an upcoming court case, boasted about how much money he had and when someone phoned him MD got in to a row with the caller. He told MD that although he had promised him a redundancy payment based on 16 years service that he would accept a six-year redundancy payment but MD had just smirked at him and told him that the company was nearly broken but that if he got money from the council he would pay him. He could not return to working for the respondent and wanted to move on. He did not feel strong enough to tell MD that he had bullied him. MD’s position was that they were “as much friends that day as ever”, the claimant talked about a number of things including his dissatisfaction with the bricklayer, whom he had engaged to build his new house, and some private matters. The claimant asked him if he would get redundancy if he were to leave but he told him that his job was still there for him when he was fit to return.

MD’s position was that over the year or so coming up to the end of 2008 the claimant crashed and wrote off the respondent’s fastrack and contended that it had not been maintained. The respondent’s evidence was that the brakes had never failed, that the brakes in a fast-track fail gradually and lock on complete failure. MD had given the claimant a loan of teleporter, which cost around €80,000, to put a roof on his new house, and a relatively new trailer both of which he passed on to third parties without consulting him. When the trailer was brought back several months later the jockey wheel had been destroyed beyond repair. It was MD’s position that the claimant owed him money for materials he had supplied to him for building his house and that “[The claimant] had got everything from me except my heart”. The claimant explained that MD had delayed the building of his house when he poached his bricklayer and that he was owed overtime pay and other monies amounting to in the region of €70,000.

MD maintained that the only time he noticed the change in the claimant was around mid-May 2009. He had provided the claimant with free storage for his furniture when he had sold his home and without any prior notice to him the claimant removed them.

On 27th May 2009 the claimant’s solicitor wrote to MD requesting the claimant’s P45, which

he alleged the claimant had requested at the meeting of 1st May.2009. He further informed him that the claimant considered himself constructively dismissed by virtue of the continuous bullying and harassment to which he had been subjected over a long period in the employment. The respondent issued the claimant his P45.

The claimant's doctor told the Tribunal that while the claimant had been with the particular practice since 1983 he had no relevant medical history prior to late January 2009 when he visited the surgery twice complaining of being under stress from work and suffering low energy, concentration and poor appetite. His GP felt he was very stressed and prescribed anti-depressant. She was concerned for his safety. He commenced with a counsellor in February 2009. Over 2009 and 2010 he complained of an extensive range of symptoms. In May 2009 and July 2010 he was seen respectively by a psychiatrist and a consultant psychiatrist; the former felt that he was suffering from adjustment disorder and the latter diagnosed this to be the case. Both psychiatrists discharged him back to the care of his doctor. The claimant had told her that he was stressed from the day he first started in the employment and this was exacerbated from August 2008. He had first complained to her about this in mid to late January 2009. The claimant was still on anti-depressants and unfit for work in November 2011. In cross-examination GP accepted that her evidence as to his past symptoms was reliant on what the claimant had told her but she found him to be very stressed and depressed during his visits to her. GP found the claimant to be "an absolutely conscientious person". She was aware that the claimant and his wife applied for planning permission in mid-June 2011 to build a funeral home. She agreed that this involved the selection of a site and discussions with professional such as engineers and architects. MD had never been made aware of any bullying allegations or received any medical certs prior to late January 2009.

The Tribunal heard detailed evidence from witnesses on behalf of both parties outlining diametrically opposed accounts of MD as an employer. One side described him as a progressive employer open to suggestions and change and good at resolving employees' problem; the culture there was a bit like a holiday camp with employees going and coming as they pleased; and, employees' relatives were taken on, including four of the claimant's brothers at different times. Employees on behalf of the claimant painted a picture of an oppressive management style, with "impossible targets", ever-changing production plans and an employer who roared and shouted a lot and was abusive.

Determination

Dismissal was in dispute in this case.

The meeting of 16th January 2009 was called because MD wanted to discuss with the claimant some concerns he had about his performance. Only MD and the claimant were present at the meeting. There was a dispute as to whether MD indicated to the claimant at the meeting that he was being made redundant. The claimant's evidence was that MD told him that he was "going down the redundancy route" with him and that he was devastated by this news. The Tribunal accepts MD's evidence that he did not tell the claimant that he was being made redundant. BK's evidence that MD had neither given her any instruction in relation to a redundancy payment for the claimant nor mentioned redundancy to her after the meeting of 16th January supports this conclusion. The Tribunal is satisfied that BK's calculation of the amount of the redundancy lump sum payment to which the claimant would be entitled, if he were to be made redundant, was not prepared by her in advance but done on-line while CW

was on the phone with her and in response to a query from CW. In the circumstances, the Tribunal finds that a dismissal did not occur on 16th January 2009.

It was common case that the claimant agreed at the meeting on 16th January that he did not wish to remain in the position of production manager and that alternative employment was offered to the claimant but there was a dispute as to whether the offer was of full-time or part-time employment. However, the claimant never resumed work after 16th January 2009 and continued to send medical certificates to the respondent until sometime in May 2009.

The Tribunal finds that the claimant terminated his employment in late May 2009 when he returned the company van and mobile phone and, through his solicitor, requested his P45. The P45, bearing a cessation date of 29th May 2009 was issued by the respondent in June. The Tribunal accepts that a cessation date of 16th January 2009 on another P45 was a clerical error and that the respondent was in contact with Revenue in respect of this error.

The claimant's evidence was that at the meeting on 16th January 2009 he understood that he was being made redundant and was so devastated by this that he could not talk to his wife and cried all weekend. This is consistent with his initiating claim form in which he stated .that after 16/17 years of loyal service he felt shocked and undermined (at being made redundant). The Tribunal finds some inconsistency between this and his allegations of having been bullied throughout the entire course of the employment. At the meeting with MD on 1st May 2009, arranged by the claimant at his counsellor's suggestion, the claimant, wanting to move on, sought a redundancy payment in respect of six year's employment (2003 to 2009) but MD refused his request, insisting that there was a job there for him when he was fit to return. The claimant did not raise the issue of alleged bullying at this meeting.

Some few days after the earlier meeting of 16th January the claimant, for the first time during his employment with the respondent, visited his doctor complaining about stress. His GP found that he was very stressed but accepted that while the claimant had complained of being stressed from the day he first day started in the employment that he had not made any such complaints of that nature to her before late January 2009. It was not disputed that MD had not at any time, prior to the request for the claimant's P45, been made aware of any allegations of bullying. Nor was he made aware that the claimant was suffering from stress while working in the employment. The medical evidence is that the more severe symptoms occurred while the claimant was on sick leave from work. There was a dispute as to whether the claimant had received the revised Terms and Conditions of Employment. In any event, in all the circumstances, in failing to give the employer any opportunity to deal with his allegations, the claimant failed to act reasonably as is required by section 1 of the Unfair Dismissal Act 1977 to succeed in a constructive dismissal case. Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)