EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE	UD1832/2010
WT819/2010	MN1784/2010

against
EMPLOYER

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. R. Prole
Mr. J. Dorney

heard this claim at Dublin on 26th January 2012
and 29th March 2012

Representation:

Claimant:
Kelly & Griffin, Solicitors, 77 Terenure Road North, Terenure, Dublin 6w

Respondent(s) :
Mr. Ken Stafford, Management Consultancy Services,
7 Castletown Court, Celbridge, Co Kildare

Claimant's case

The claimant brought this case for unfair dismissal to the Tribunal on the basis that he had no alternative but to resign and therefore was constructively dismissed from his employment.

The claimant commenced employment with the respondent on 16th August 1993. Initially he was a skipper on board a Trawler owned by the respondent and then he became a lorry driver. In 2001 the claimant became Assistant Manager in the respondent's shellfish processing plant and in 2002 he took over as Manager when the previous Manager left. The claimant did not receive any formal training but learned on the job.

The claimant gave evidence of certain practices which he was forced to participate in during the

course of his employment. Some of these were:

- Ensure that sodium hydro chlorine [a bleaching agent] was put on the tables where the samples were to be taken for testing by the Sea Fisheries Board;

- To pack any product that fell on the floor or was otherwise damaged, failing which he was told to get out the door in vulgar language;

- Product returned was to be re-packaged and distributed again once all traceability had been removed;

- Illegally dumping contaminated product at night, in different harbours. This was done because, even though the respondent had a dumping permit, it was cheaper to do it this way;

- Instructed to dip shellfish in Sodium Metabisulfite to extend its shelf life;

- The claimant's son when working there was told to forge signatures on certain documents.

The claimant was belittled in front of staff and so called management meetings were used by the respondent MD to roar, shout and generally badger staff including the claimant.

In June 2009 the claimant was told that his salary was being reduced to €40,000.00 per annum. This was a cut of €10,000.00 per annum and he was told that this was to be given to the MD's son who was going to be the General Manager. This announcement was made in front of staff in the canteen. The claimant was also demoted to Assistant Manager. The claimant did not agree to this demotion or reduction in pay and thought the pay reduction had been decided against until it actually occurred in Dec 2009. At this point the claimant approached the respondent and asked why his pay had been cut and was told that it had been discussed in June and that if he did not like it he was told in unacceptable language that 'he knew where the door was'. During the period from June to December 2009 the claimant felt that his management position was being undermined and that he had been reduced to a “General Dogs Body”. He was now being instructed to carry out tasks such as repairing a gate and collecting product in the lorry from various harbours. The claimant was also told that a new Production Manager was going to be appointed and if that person did not like the claimant he would fire him. He requested a Contract of Employment but was not given one even though other staff were.
The claimant never received any verbal or written warning in relation to his work.

The Claimant went on sick leave in January 2010 due to work related stress. There was no written agreement in relation to pay while on sick leave but there had been precedence in relation to this whereby staff were paid while on sick leave. However the claimant’s pay was stopped as soon as he went out sick.

While the claimant was on sick leave he heard that the respondent was advertising for someone to replace him. The claimant engaged a solicitor who corresponded with the respondent’s representative on a number of occasions between 28th January 2010 and 17th June 2010. This correspondence culminated in the decision by the claimant that he had no choice but to resign from his employment with the respondent. The claimant resigned by letter dated 25th June 2010.

Copies of all written correspondence between the representatives were submitted to the Tribunal.

A former work colleague of the claimant gave evidence that during her time working with the respondent it was common to peel off labels from returned product and re-distribute it. Furthermore she often had to wash prawns in fairy liquid to 'give them a better look'.

The claimant's son gave evidence that he was asked by the respondent to forge certain documents and re-label and re-package stock.

Respondent's case

The Respondent MD confirmed the claimant's dates of employment and the fact that he was promoted to Production Manager in 2002. The claimant was Assistant Manager for a year previous to that and when he took over the role of Production Manager the respondent asked him if he was confident to do so and was told yes.

However as the plant began to increase output it became clear that the claimant was not up to the task of Production Manager. Therefore in or around June 2009 the respondent informed the claimant that he was to be demoted to Assistant Manager and that the owner's son was to take on more responsibility. Along with this demotion there was to be a €10,000.00 decrease in pay per annum. The claimant verbally agreed to this pay cut and demotion. Although the pay cut was agreed in June it was not put in place until December 2009.

The respondent denied that there was ever such a post as General Manager and that the claimant was a Production Manager before being demoted to Assistant Manager. It was also denied that the respondent advertised for a replacement for the claimant while the claimant was on sick leave or that he told the claimant they were going to hire a new Production Manager who would sack the claimant if he did not like him.

The MD disputed the evidence of the claimant in relation to dubious work practices and that he was never prosecuted and had a good relationship with the Department of the Marine. While he agreed that he did dump waste at sea he also sold waste to customers in France.

He agreed that he used bad language to the claimant but it was not personal.

In relation to the correspondence entered into after the claimant went on sick leave he gave evidence that the first letter from his solicitor was sent without his permission.

Determination

The claimant gave evidence of an employment history where, at least from early June 2009 onwards, he was subjected to bullying, harassment, subjected to foul and abusive language, belittled, criticised in front of staff, forced to engage in dubious and appalling work practices, demoted from manager to assistant manager, and having his salary cut by €10,000 per annum. The respondent MD gave evidence that he did demote the claimant, reduce his salary by €10,000 and used bad language to the claimant but disputed the remainder of the claimant's evidence. The claimant tried to engage the respondent in relation to his grievances but the respondent refused to enter discussions with him. The claimant was stressed as a result of the way he was treated and went on certified sick leave in January 2010.

He instructed his solicitorto write to the respondent to try and resolve the differences. The respondent engaged a solicitorto reply to the initial letter written by the claimant's solicitor. However at the Tribunal hearingthe MD gave evidence that the solicitor engaged by him did not have authority to write in theterms in which he did. This seems strange to the Tribunal because it is difficult to imagine asolicitor writing a letter without the instructions of his client. The Tribunal wonders how wouldthe solicitor know what to write in such circumstances? In any case the respondent engagedanother representative to respond to the letters from the claimant's solicitor. Presumably therespondent's new representative was writing having taken instructions from the respondent. TheTribunal is satisfied that the correspondence exchanged demonstrated an un-willingness on thepart of the respondent to engage in a meaningful way to resolve the claimant's legitimategrievances. Having failed to resolve his grievances the claimant resigned by letter dated the25th June 2010 and claimed constructive dismissal.

A constructive dismissal will occur when an employee terminates his Contract of Employment where, because of the employer's conduct, the employee was entitled to terminate his Contract without notice or where it was reasonable for him to do so. It has been well established that a question of constructive dismissal must be considered under two headings – entitlement and reasonableness. An employee must act reasonably in terminating his Contract of Employment. Resignation must not be the first option taken by an employee and all other reasonable options, including following the grievance procedure, must be explored. An employee must pursue his grievance through the procedures laid down before taking the drastic step of resigning. Unfortunately there was no Grievance Procedure that the claimant could invoke. Indeed the claimant did not even have a contract of employment despite having requested one. Where there is no Grievance Procedure, as in the claimant's case, the claimant must act reasonably.

The Tribunal has to decide whether the Claimant was constructively dismissed. It is clear that the Claimant resigned from his employment on the 25th June 2010. The Claimant is claiming that he was dismissed by construction as envisaged by Section 1of the Unfair Dismissals Act 1977 (the Act).

Although the term "Constructive Dismissal" is not specifically mentioned in the Act, it is the term commonly understood to refer to that part of the Definition Section of the Act, which states: "dismissal in relation to an employee means the termination by the employee of his contract of employment with his employer whether prior notice of determination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employee".

The Tribunal must consider whether because of the Employer's conduct the Claimant was entitled to terminate his contract or it was reasonable for him to do so.

An employee is entitled to terminate the contract only when the employer is guilty of conduct which amounts to a significant breach going to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. In the case of Brady v Newman UD 330/1979 the Tribunal stated

> "….. An employer is entitled to expect his employee to behave in a manner which will preserve his employer's reasonable trust and confidence in him so also must the

employer behave".

Having considered all the evidence carefully the Tribunal determines that the claimant was constructively dismissed and that the Employer was guilty of conduct which amounted to a significant breach of the contract and that he failed utterly to engage with the claimant to resolve the claimant's grievances. The Tribunal further determines that compensation is the most appropriate remedy under the Unfair Dismissals Acts 1977 to 2001 and awards the Claimant €30,000.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

No evidence was adduced in respect of the claim under the Organisation of Working Time Act, 1997 and therefore that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)