

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD1151/2010

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. N. O'Carroll-Kelly BL

Members: Mr. M. Carr
Ms. A. Moore

heard this claim at Monaghan on 3rd November 2011, 14th February 2012 and 15th February 2012.

Representation:

Claimant:

Mr. Jim Mullery, Branch Secretary,
SIPTU, 3/4 Old Cross Square, Monaghan, Co Monaghan

Respondent:

Andrew Pierce, HR Consultant, Collane, 89 Main Street, Cavan.

Claimant's case

The claimant was employed by the respondent as a refrigeration engineer from 9th November 1987 to 19th October 2009. The respondent company is a food refrigeration/freezing and storage facility. The claimant alleged that he was constructively dismissed and therefore was required to present his case first.

Having reached the stage where he felt his job had become non-existent the claimant felt he was left with no option but to resign and did so by letter dated 8th October 2009. He took annual leave instead of working out his notice. His employment terminated on 19th October 2009. The claimant gave evidence in relation to incidents whereby his role was undermined and responsibility taken away from him. These incidents included the following.

- He was instructed to raise the temperature on the freezers and the blast freezers so as to save on costs even though this would mean putting the product at risk.
- The claimant was on annual leave in July 2007 but was called in to deal with a problem in the plant. The respondent was annoyed that this problem could not be solved by a

colleague of the claimant and would not pay the claimant a call out fee. Therefore the claimant asked his union to address this issue and the union subsequently negotiated a new on call allowance. The claimant was informed that he had breached his contract and was given a verbal warning by the respondent.

- The claimant was excluded from negotiations, in which he would normally have been included. These included contract negotiations for a wind turbine, a static racking system, roofing/fire protection and forklift purchase/maintenance.
- Part of the claimant's job had been to deal with the applications for rate rebates from the Co. Council. However this job was taken from him and when he asked why he received no response.
- Another aspect of the claimant's job that was removed from him was pest control.
- From time to time the claimant needed to resolve electrical issues in the plant. However the maps and drawings of the electrical circuit/fuse box had been taken from him and he was expected to "go in blind".
- On the 27th March 2009 the claimant received a letter from the respondent which outlined a revised procedure in relation to the taking of annual leave. Up to that time the claimant would tell his colleague when he intended taking leave and there was no management input necessary. However this was changed within the revised procedure and the claimant felt that this undermined his position in the company.
- The claimant had provided the company with a medical certificate from his GP in relation to his absence from work. However, even though the company's sick leave scheme provided for payment of wages while on certified sick leave, the claimant was not paid his wages.

Respondent's case

Witnesses for the respondent denied that the claimant had ever been told to run the equipment at below safe temperatures and stated that they had never had any complaints from customers or the regulatory body for the industry.

The respondent addressed each incident whereby the claimant felt his responsibility was undermined or he was excluded from contract negotiations or rebate claims.

- Witnesses for the respondent denied that the claimant was ever told to increase the operating temperatures for the freezers and that there had never been any complaints from customers or the industry regulator in respect of products.
- The respondent did not deny that he refused to pay the claimant a "call out" in July 2009 and confirmed that he had agreed an on call allowance for the claimant. Details of this allowance were outlined to the Tribunal.
- A witness for the respondent (PS) stated that the wind turbine project was never going to happen as there was no funding available for it. Another witness (TH) gave evidence

that most of the equipment in the plant was owned by the respondent and that very little was leased. If leasing was required, the person who needed the equipment leased it with the authority of the accounts department. PS also stated that the roofing and fire prevention project that the claimant spoke about was never carried out and that there were no immediate plans to do so. There was no issue with the Fire Officer in relation to this matter.

- The job of applying for rate rebates was never exclusively carried out by the claimant and anybody could do this.
- The job of pest control was taken over by an enhanced quality control function. The respondent had secured new UK customers and this enhanced quality control was part of their requirements.
- PS wrote to the claimant on 10th July 2008 and among other things requested that the claimant provide details on the lighting, lay outs, trip switches etc. throughout the company. It was the position of PS that these drawings/maps were not withheld from the claimant.
- The respondent carried out a review of the annual leave procedures and found that they required some amendments. Accordingly they issued the letter of 27th March 2009. This was not an attempt to undermine the claimant.
- The respondent's position in relation to non-payment of sick pay to the claimant was that, notwithstanding the certificate from the claimant's GP, the company's doctor found that he was fit to resume work.

Determination

The claimant is alleging he was constructively dismissed from his employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as: *“the termination by the employee of his contract of employment with this employer whether prior notice of the termination was or was not given to the employer in the 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 employer”*

The burden of proof, which is a very high one, lies with the claimant. He must show that his resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to terminate the contract was a reasonable one.

The claimant took issue with the following matters:

- The Storage temperature of the fridges.

- Power in relation to the blast freezers.
- Call out fee
- Being cut out of purchasing contracts, wind turbine contract and static racking contract.
- Rates rebates.
- Lack of fuse box maps/drawings.
- Dangerous working conditions
- Pest control
- Holidays
- URC project/Niall Shortt.

The claimant stated in evidence that he was instructed to raise the temperature of the freezers. He felt that to do so would put the product in the freezers at risk. There was conflicting evidence from PS, NS and TH in relation to the required temperature. There was no evidence that the respondent ever received complaints in relation to the quality of the product from either their customers or from their governing bodies. On that basis the Tribunal find that the higher temperature used, which the claimant took issue with, was adequate and did not affect the product contrary to the claimant's belief.

A similar exchange took place in relation to the blast freezers. Again there was no evidence of complaints from either the customers or the governing bodies in relation to the quality of the product when it was removed from the freezers. On that basis the Tribunal find that the method used to blast freeze the products was adequate.

In July 2007 whilst the claimant was on annual leave he received 13 or 14 phone calls (missed) in relation to an issue at the plant. He attended at the plant and solved the issue that NC was incapable of solving. PS gave evidence that he was so annoyed that NC couldn't resolve the issue himself that he took it out on the claimant and didn't pay him his call out fee. That was fundamentally unfair. The claimant did not raise a formal grievance. He did however involve his union to negotiate a new "on call rate". That proved very expensive for the respondent. The claimant was given a verbal warning in relation to the issue and was informed he was in breach of his contract. That again was fundamentally unfair and simply incorrect. The tribunal are unaware whether that verbal warning was ever expunged.

The claimant gave evidence that he was cut from several purchasing / negotiating contracts (i.e. wind turbine, static racking, forklift). PS gave evidence that the wind turbine project was never going to be approved as there was no funding available. TH gave evidence that most equipment at the respondent's plant was privately owned. Very little of it was leased and if leasing was required the person, who needed the equipment, leased it with the authority of the accounts department. There was no evidence that the claimant was ever exclusively involved in purchasing or leasing. The claimant felt that after he had designed the static racking system he was excluded from dealing with the outside contracts and felt his authority was being undermined. The tribunal, taking the respondent's explanation of the above situation into account, find no basis for the claimant's allegations.

The claimant gave evidence that he always dealt with the County Council in relation to rate rebates. He stated that those duties were removed from him. He asked PD about it and he didn't receive a reply. PS gave evidence that the role of applying for rebates was never exclusively the claimant's job and that anybody could do the job.

The claimant stated that the maps /drawings for the fuse box system were taken off them and that they were expected to go in blind to resolve any issues. On the 10th July 2008 PS wrote to OD and requested at no. 7 of that letter that OD “provide details on the lighting, layouts, tripswitches etc. throughout the company”. The claimant replied “Any lighting problems can be traced to the fuse boards. No drawings available” It is clear from the correspondence that neither PS, management nor OD knew where the drawings were. On that basis the tribunal can’t conclude that they were deliberately taken off the claimant. It is more likely that they were taken by another member of staff and not returned.

The claimant was originally involved in pest control. PS gave evidence that they had sought and secured new clients in the UK (e.g. Tesco) and that in order to facilitate their business he needed to meet the BRC standards. It was necessary for him to employ a specific quality control specialist. The role of pest control was subsumed into the quality control role. It would seem that there was a complete lack of consultation with OD which no doubt lead to him feeling undermined.

Holidays. Previously the claimant arranged holidays in conjunction with his maintenance colleague NC without any managerial input. The claimant received a letter from KH on the 27th March, 2009 stating that the above practice was “to change with immediate effect” On balance the tribunal feel that this probably was an attempt to undermine/ diminish the claimant’s authority. The holiday system worked without issue prior to the change. The change was probably unnecessary however it was within the respondent prerogative to make amendments to their system.

In March/April the claimant got quotes for roofing a new area and fire protection upgrade. He feels he was cut out of that. PS gave evidence that, that project has never been completed and that there are no immediate plans to do so. Furthermore the fire officer has not taken issue with it.

It was clear from the evidence that the respondent breached its own sick leave policy. Sick pay was withheld from the claimant even though he had a certificate albeit that it contradicted a recent company certificate. The claimant should have been paid under the company sick pay scheme. However it should be noted that this issue is outside the jurisdiction of the tribunal.

The burden of proof placed on the claimant is a very high one. Taking all of the evidence into account, the tribunal find that the claimant has not satisfied that burden and therefore his claim under the Unfair Dismissal Acts, 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)