

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE,
-claimant

CASE NO.
UD817/2011
RP1123/2011
MN935/2011
WT336/2011

against
-respondent

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr D. Moore
Mr P. Trehy

heard this claim at Dublin on 13th September 2012

Representation:

Claimant:

Respondent: In Person

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act 1994 were withdrawn at the outset.

Claimant's Case

The claimant commenced employment in November 1999 as a model maker. In February 2009 the respondent asked all staff to be paid monthly instead of weekly, which they all agreed to. In April 2009 the respondent asked all the staff to take a pay cut of 30%; they were assured this would be a temporary measure so again the staff agreed. By April 2009 the staff compliment had been reduced from 18 to 3, including the claimant. New terms and conditions were not issued to the staff. As a 'sweetener' to the 30% pay cut the claimant was informed that he could take Friday afternoons off (paid) if his work was completed.

The respondent ceased collecting time sheets at this time; the claimant continued to keep his own timesheets. The issue of overtime arose at this stage. Overtime was

calculated as per the time sheets but the respondent ceased to pay overtime. The claimant raised this issue on numerous occasions. No official agreement was reached regarding time in lieu but the claimant was told 'to take Monday off.' The working week was 36 hours as he had Friday afternoons off; his salary was paid as a 40-hour week. When the claimant was asked to return to working a 40-hour week he queried whether overtime would be paid; he was informed that there was no money to pay overtime.

The respondent put all staff on a 3-day week in January 2010 and put the claimant on lay-off for one week at the end of February 2010. The claimant returned to work on the 4th of March 2010 with the same conditions imposed i.e. no overtime payment, 30% pay cut and working 36 hours a week. On the 2nd of April the claimant asked again about overtime payments; the respondent said there was no money so the claimant said he would no longer be working overtime. As a result of that conversation the claimant asked for a copy of his contract, as he knew it said he had to be paid overtime. The atmosphere in the respondent was 'very gloomy' at this time and resulted in the claimant suffering from anxiety.

The claimant was working part-time hours from the 21st of May and then put on lay-off for 8 weeks. The claimant served the RP9 notice to claim redundancy on the 24th of June 2010. The respondent served the counter notice offering the claimant the required 13 weeks guaranteed work. The claimant reiterated that he was not going to work any overtime if it was not paid. Overtime should have been paid after 160 hours per month. The respondent agreed to pay any overtime the following month if the claimant was unable to take time off in lieu within the month. The claimant asked for this agreement in writing.

The claimant discovered in August that his Friday afternoon off was no longer being paid; this was not discussed when the claimant returned from lay-off. Being paid on an hourly basis as opposed to a salary was never discussed or requested by the claimant. The respondent also asked him to sign a new contract. The claimant asked for a meeting to discuss the Friday afternoon pay and the reversal of the 30% pay cut. The respondent was angry and said they would think about what the claimant said. The respondent reverted 3-4 days later saying that nothing would change and that the claimant was 'lucky to have a job.' The claimant resigned by letter of the 31st of August 2010 stating, *'I am writing to notify you of my decision to leave the company at the end of September. I'm grateful for these 11 years in (the respondent) but it's time for me to move on.'* The claimant believes he was not made redundant as his salary was the cheapest and he was good at his job. The claimant accepts he was asked to return to work post his resignation but the terms and conditions would not change.

The claimant gave evidence of loss and his attempts to mitigate his loss.

Respondent's Case

The respondent's business of model making was heavily dependent on the construction industry. When the construction industry collapsed the respondent's business suffered severely and they had to make some drastic cost cutting measures. All the staff except the claimant and two senior model makers were made redundant. A 30% pay cut was

implemented, the staff were also put on a 3-day week from January 2010 and put on a week's lay off in February 2010. There were difficult discussions with the claimant during this time as he was unhappy with the situation but the respondent had no choice if the business was to survive.

The claimant was told to take Friday afternoon off if work was quiet. He was also instructed to take time off in lieu for any overtime worked. The claimant was not happy with this situation and wanted to be paid for all his hours worked. In order to facilitate this, the claimant was changed from a salaried position to being paid on an hourly basis. The respondent could not locate the claimant's contract so asked him for his copy in order to draft a similar one to include the new hourly rate of pay. As the claimant was now being paid hourly time sheets were collected again and it resulted in him being paid for exactly what he worked i.e. 36 hours and not 40 hours a week. The respondent had work and wanted the claimant to remain working when they received the claimant's resignation letter.

Determination

Having carefully considered all the evidence adduced the Tribunal is satisfied that the respondent did not engage in behaviour that would entitle the claimant to consider himself constructively dismissed. The claimant did not discharge the onus of proof as is required in a constructive dismissal claim. The claim under the Unfair Dismissals Acts 1977 to 2007 fails.

As this was a claim for Constructive Dismissal the appeal under the Redundancy Payments Acts 1967 to 2007 does not arise.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)