

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE (*claimant*)

CASE NO.
UD581/2011
MN619/2011

Against

EMPLOYER (*respondent*)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr R. Maguire, B.L.

Members: Mr D. Peakin
Mr S. Mackell

heard this claim at Dublin on 26th July 2012 and 1st November 2012

Representation:

Claimant(s) : Joe Clancy, Solicitors, 41 Main Street, Rathfarnham, Dublin 14

Respondent(s) : Ms. Ursula Sherlock, Licensed Vintners Association, Anglesea House,
Anglesea Road, Ballsbridge, Dublin 4

The determination of the Tribunal was as follows:

Claimant's Case

The claimant (PK) gave evidence of commencing employment with the respondent in May 1989. Duties included lodgements, stock control, managing staff and the day to day management of the business. The business was very busy up to 2008 when business started to decline. He had a good working and personal relationship with the respondent director/owner GF. Over the period 2008 to 2010 staff reductions and reductions in pay were implemented. In late 2009 his pay switched from a salary to being paid per hour worked and his rostered hours were reduced. This applied to other employees also at that time. In September 2010 GF himself was due to take up rostered hours of employees who were let go however he often failed to cover the hours and the claimant was left to carry the can. GF and the company accountant (BM) discussed making two other employees redundant and the claimant advised they would not be interested in redundancy. He himself at this stage was unhappy and in and around the 1 October 2010 sought a redundancy package. GF indicated he would like him to stay on but

agreed to consider the matter and discuss it with BM. On the 9 October 2010 he sought an update on the redundancy and a meeting was arranged with BM which took place on the 13 of October. He never indicated to either GF or BM that he would leave the job. This was not an option for him due his financial situation. The discussions which took place at all times centred around a redundancy package and he knew that GF would be responsible for making the final decision. On the 20 October GF informed him that a redundancy package was not an option and that was BM's decision. He was gutted at that time but made no reference to leaving employment. On returning from a week's holiday which he was rostered to take, BM commented to him that he heard he had thrown in the towel. He could not explain how BM came to this conclusion. A letter dated the 3 November 2010 was delivered by courier to his home which made reference to his resignation being accepted and included his P45 and wages. The claimant denied making any threats as referenced in the letter and was devastated with the content. After a number of days in and around the 18 November 2010 he made contact with the respondent indicating his wish to return to work.

RB and JW both employees of the respondent at the time gave evidence of working with the claimant. They both told the Tribunal that the claimant never indicated to them that he was resigning from his employment. They were shocked and surprised when they were informed by GF that he had resigned.

Respondent's case

Giving evidence, GF, Director, explained that the claimant was the Manager of the business and subsequently became a Director of the company. GF took a back seat in the day to day running of the business due to ill health. In late 2008, discussions took place within the company in relation to reducing costs. GF stated that the claimant suggested a later opening time rather than making anyone redundant. Discussions took place in relation to making two floor staff redundant but this did not materialise. In 2009 the claimant indicated to GF that he hated coming to work and suggested a redundancy payment, stating that he felt his service was worth a payment €30,000 from the respondent. GF explained that he told the claimant he wanted him to continue working for the business and rejected the suggestion of the claimant leaving.

GF told the Tribunal that the claimant raised the issue of redundancy again in October, 2010. He explained to the claimant that he would be the last person to be made redundant if the company decided to go down that road. On 13th October 2010, JF arranged for the claimant to meet the Accountant and GF instructed the Accountant to convince the claimant to stay. After the meeting took place, the Accountant informed GF that the meeting had not been satisfactory with the claimant and as a result, GF told the claimant to take a week off to consider the matter and also offered an extra €100 per week pay increase. The claimant indicated to GF that he did not want time off, he wanted redundancy.

GF indicated that on 18th October 2010, the claimant came to him with the diary and said he wanted to be gone in a month. The claimant referred to his "resignation" and was told by GF that he could keep the company car. At the end of October 2010, the claimant told GF in a threatening voice that "things would get worse when I get back". This statement prompted GF to write to the claimant on 3rd November 2010 outlining the situation. Correspondence between the respondent and the claimant was opened to the Tribunal.

GF indicated that by letter dated 19th November 2010, he offered to meet with the claimant to discuss matters but the claimant did not follow up on this. The reason he wanted to meet the

claimant was to find out what was on his mind and to ask him did he wish to return to work. According to GF, an interim Manager was appointed on the recommendation of the claimant. The witness was not aware of any financial difficulties of the claimant at the time. The claimant never requested a reference from the respondent but a good reference would have been issued had a request been made.

In cross-examination, when it was put to GF that the claimant denies offering his resignation in 2009, the witness indicated that the resignation had in fact been offered by the claimant. Redundancies were not being considered for two other members of staff at the time.

In relation to contracts of employment, GF explained that contracts were not issued to staff as it was a family business and was based on trust. The reason a letter was issued to the claimant on 3rd November 2010 was to avoid any misunderstanding.

GF denied that the claimant had been engaged in negotiations for redundancy and also denied that the claimant had accepted that was the end of the matter when it had been refused. The offer of an increase in pay was made by GF to the claimant after the 13th October meeting with the Accountant.

In reply to the Tribunal, the witness stated that he did not know what the claimant meant by his threat of “things would get worse on his return”.

Giving evidence, the Accountant stated that he was told by GF to try and convince the claimant to stay at the meeting of 13th October 2010. He dictated the minutes of the meeting that same day and reported back to GF either that same day or the day after. At that meeting, the Accountant asked the claimant did he have another job to go to but the claimant did not reply. He could not convince the claimant to stay in his employment with the respondent. The Accountant was not sure when the extra €100 per week was offered to the claimant. It was the claimant who brought up the subject of redundancy at the meeting on 13th October 2010 and therefore had to be addressed by the Accountant. The Accountant told the claimant redundancy was a matter for the company.

It was put to the witness that on a subsequent date he had said to the claimant that “I believe you have thrown in the towel” and that the claimant had replied “no”. The Accountant stated that the claimant never told him he was not leaving.

In reply to the Tribunal, the Accountant stated that he made it clear to the claimant that redundancy was not an option.

Determination

The Tribunal has considered the evidence and submissions of both parties. Unfortunately, the ostensibly contradictory evidence leads the Tribunal to the conclusion that there was in fact a great misunderstanding between the parties at a time of great personal and business pressure on both the claimant and the proprietor of the respondent. The Tribunal is satisfied that, whatever the respondent understood, the claimant did not intend to resign and did not in fact resign.

In such circumstances, however, the Tribunal is of the view that there is a greater responsibility on the employer than on the employee to ensure full clarity with respect to the ending of the employment relationship.

In these circumstances, the employer failed to take adequate steps to formalise in early course what it understood as an explicit resignation. Because of this failure by the employer, the Tribunal finds that a dismissal took place and that it was unfair.

The Tribunal however finds that the failure of the employee to respond to the delayed correspondence of the employer of 3 November in a timely fashion was a failure to fully mitigate his loss and therefore the Tribunal finds that in all the circumstances the appropriate award to the Claimant is €60,000.

The Tribunal also awards the claimant his statutory entitlement of €7,813.20 being the sum due for eight weeks' notice, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)