

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD631/2011

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr C. Corcoran B.L.

Members: Mr J. O'Neill
Mr C. Ryan

heard this claim at Dublin on 27th July 2012 and 20th November 2012 and 21st November 2012

Representation:

Claimant: Mr. David Fagan, Eversheds O'Donnell Sweeney, Solicitors,
One Earlsfort Centre, Earlsfort Terrace, Dublin 2

Respondent: Hayes, Solicitors, Lavery House, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's case:

The claimant PB ran a family business until taking up employment with the respondent in 2005. He began as a pharmacist and was later promoted to the role of supervising pharmacist. The position is governed by the pharmacy regulator and the Pharmacy Act. PB received a written offer of employment but was never given a contract.

The Pharmacy Act requires that a supervising pharmacist be on the premises at all times. He had ultimate responsibility, even when on holidays. PB could not take a break while he was on duty. There was no facility to leave the premises. He might get five or ten minutes to have a cup of tea. As stated in the grievance procedures in his written offer of employment he could refer difficulties to the HR manager. He was not aware of who that person was and had never seen or heard of anyone with that title in the pharmacy chain.

Link selling was not something that was not permitted by the regulator. In July of 2009 an incident occurred where a locum sold an out of date product. PB received a telephone call from the general manager JG. She was very angry about the incident and said overall responsibility was his. On 23rd July PB sent a list of complaints about jobs not being done by locums to Mr P the superintendent pharmacist. MR P was somebody you might see every six to eight weeks. PB never received a reply to the list.

At his K.P.I. meeting in February of 2010 with Mr P he discovered that his hours had been extended without consultation or consent. A new rota had been imposed. At that meeting he also discussed link-selling, which was used to promote extra sales and was told that every prescription must have an over the counter recommendation attached. On 25th February PB wrote to the financial director BC requesting his terms of employment and on 5th March he received a new roster which was to alleviate his concerns. It provided for longer shifts and still did not address the issue of breaks. He again sent an e-mail to Mr P, advising that, while he accepted the roster he wanted his rest break entitlements and terms of employment before it was implemented. He again received no reply and the roster was implemented unilaterally.

Another K.P.I. meeting was held on 12th April. It was a meeting that was called at short notice, he was just told that Mr P wanted to see him. The meeting began with Mr P saying “ well, speak to me”. He had the latest reports in front of him and said that customer care was not as high as he would like it to be and over the counter recommendations were not on all prescriptions. PB explained that he couldn’t answer for locums and he was attaching the recommendations to most of his sales He advised Mr P that people bought their medications where it was cheapest and it was not always possible to attach a recommendation. He was told it was his responsibility. and that he had to do it.

An issue also arose about a daily print-out which is done at the end of each day indicating what was dispensed for that day. The print-out is signed and dated by the pharmacist on duty. Mr P informed him that he wanted the document to be amended to reflect the drug that had been purchased by the pharmacy chain. The issue of breaks was also raised by the claimant and the meeting ended abruptly with Mr P saying “you will do as I want”.

When the claimant returned to his place of work he became ill with chest pains and was taken to hospital by ambulance. He was suffering from stress and has since attended stress management clinics. Before his return to work on 18th May he wrote a detailed e-mail to Mr P advising him that he was not a troublemaker, requesting clarification of various issues and again advising that he needed rest-breaks. He received no reply.

In July PB was asked to go through a list of payments given by the H.S.E. It was to be done line by line. He didn’t have the time and with only one computer in the store it was logistically impossible. He was told by JG, the general manager to “get on with it, everyone else was doing it”.

The claimant found the situation intolerable, he was stressed and as the only supervising pharmacist felt people’s lives were at risk. He went to his doctor again and remained on sick leave until he tendered his resignation in September 2010.

Under cross examination PB stated that he did receive a company hand book, it was not specific to him. He accepted the new rosters in principle but only if rest breaks was included. Asked when rest breaks became an issue he said that with the introduction of the Pharmacy Regulation Act a statutory code of conduct was introduced and as the only dispensing pharmacist it was not

conducive to patient health for him not to be able to take a break. He couldn't leave the premises and was on duty at all times. The claimant denied being offered a different store to alleviate his problem or of having any reply to his concerns. He wrote to the Pharmaceutical Society but did not receive any reply. When put to the claimant that his concerns were discussed ad infinitum at various K.P.I. meetings and that he wasn't happy with the replies he received he stated that this was "not correct".

Asked about coding the PB agreed that a drug such as Lipitor had different suppliers, there was a different code for each supplier and the re-imburement price was different. He disagreed that he was only asked to change a code to properly reflect what had been dispensed.

Respondent's case:

Mr P owner and superintendent pharmacist gave evidence that he was fully familiar with all the Codes of Practice and Acts relating to the industry. He stated that changes to the Pharmacy Act gave more of an understanding of it but the core issues didn't change. The claimant worked 36 to 40 hours per week and as supervising pharmacist was responsible for the store for all the hours it was open. Mr P had an excellent relationship with the claimant and for the first three years of employment there were no issues whatsoever. Rest breaks became an issue for the claimant in 2009 after a visit from JG and the dispensing error of a locum.

Mr P stated that there was an understanding in the sector that you took a break when it was quiet and you had an opportunity to do so. It was left to his professional judgement to take a break whenever he could. The revised roster was agreed with the claimant and he understood that he was happy with it. He also understood that all issues were resolved at that time. When PB went sick there were discussions regarding a split shift but he didn't want to do it, he was also offered a quieter store.

Mr P said that he never asked a pharmacist to foist products on anyone but interaction with the customer was necessary and best options/other recommendations would be appropriate. A label attached to each dispensed product should include recommendation even if it only stated, take with water or with food.

The meeting of 12th April was held in a local hotel. Mr P felt that they were re-visiting the same issues all over again. He told PB that the decisions had been made and asked him to adopt the position that was required from him. PB later went on sick leave and when Mr P received his letter of May 17th it was the same issues over again.

With regard to the recording/coding done at the end of each day Mr P stated that there were different suppliers and different prices for each drug. What he was looking for was that the code matched the supplier and the price. It was necessary for auditing and payment. He needed PB to make sure claims were correct. He was not asking him to fraudulently change anything.

SC gave evidence that she works a five day week as a qualified pharmacist. She is usually able to take an hour lunch, sometimes it may be interrupted but it's not an issue. It was her evidence that no pharmacy can afford to close for lunch and locums don't cover it lunch hours. Asked if she thought it was right she said, no but it was "common practice".

CG gave evidence that part of her role with the respondent was coordinator. Rosters and locum cover was done on a monthly basis. She would have rang the claimant to confirm the change in

roster and advise him that 12 hour shifts were gone. She received notification of a Rights Commissioner hearing on 8th November, the claimant had already left and she tried to contact him by mobile and text. She received an e-mail from the claimant's wife saying that any further contact should be via e-mail or letter. Having received no reply by 15th November she contacted his new place of employment, she was told he was busy. His wife later made contact to say stop trying to make contact.

Determination:

The Tribunal having carefully considered all the verbal and documentary evidence submitted and taking all the circumstances into account is satisfied that the claimant was constructively dismissed from his employment. The Tribunal award the claimant the sum of €19,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)