

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1673/2010,
WT721/2010

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin
Members: Mr. P. Casey
Mr. J. Flavin

heard this claim at Cork on 2nd February and 31st May 2012

Representation:

Claimant: Ms Sarah Daly B L instructed by
Ms Yvonne Joyce, Michael Powell, Solicitors, No 5 Lapps Quay, Cork

Respondent: Ms Deirdre Cummins B L instructed by
McGuire Desmond, Solicitors, 5 Lapps Quay, Cork

The determination of the Tribunal was as follows:

Claimant's Case:

Prior to commencing employment with the respondent in early January 2003 the claimant was self-employed in the construction industry. Much of that work involved high quality renovation and restoration jobs in which he had many clients. One of those clients was a director of the respondent who recruited him on a permanent full time basis. The respondent's clients were more broad-based and ranged from specialized orders to general building work.

The claimant held the position of foreman on site and most sites had a project manager. From the commencement of his employment up to November 2009 he had not been furnished with his terms and conditions of employment nor provided with a company handbook and was never made aware of the respondent's grievance procedure. By the date he was issued with a contract of employment, the claimant, due to ongoing difficulties with his employer, did not sign that contract.

Those difficulties mainly consisted of bullying, harassment and general mistreatment by two of the directors over a lengthy period. The claimant told the Tribunal of his experiences in Killarney in 2006 where he was foreman on up to four separate sites at the one time. He found himself over stretched working long hours and having long daily commutes. Apart from site work he was also expected to undertake administrative tasks on a computer, which he struggled to complete. The respondent did not provide any computer training for him and he felt obliged to attend evening lessons to gain some knowledge of those machines.

While on one of those sites he had "a blazing row" with the project manager who was also the managing director, which left the claimant badly shaken. On that occasion the claimant told the managing director he was being unreasonable in his demands and expectations. That director reacted in an intimidating aggressive manner.

While back in Cork the claimant's workload was spread over several sites. This time his project manager was another director of the company. That manager constantly pressurised him in an aggressive manner over work demands as he always urged the claimant to hurry up with the jobs. While he emphasized speed the claimant was more focused on doing the jobs properly and professionally. That pressure and unwelcome behaviour added to the claimant's stress and well being. Due to his long working hours he was seldom at home and his domestic life suffered. Towards the end of 2008 he was called into the respondent's office where he met those two directors for a "disciplinary" meeting. He was placed on probation with no set targets or no written information.

Notwithstanding expressing his concerns about the second director, there was no change in that person's behaviour towards the claimant in 2009. He was the claimant's project manager on his sites but according to the claimant it would have been better had that manager not been there as he continued to give him grief. That grief came again in the form of ill treatment, abusive language, and unreasonable pressure. On one occasion the claimant was told by him that if he could not do the job then to get out of the way. The respondent did not provide enough personnel to perform the required work in the time the project manager demanded it be done. The claimant was devastated at the constant shouting and roaring from that manager.

In September 2009 he met the managing director who offered him a number of options that included a pay cut and a profit share scheme. The alternative to accepting one of those options was "to stay at home". Despite not agreeing to a cut in his wages the claimant's remuneration was reduced unilaterally as his gross monthly pay from October onwards was reduced.

At one particular site the claimant was subjected to racist abuse from another worker. When he told the project manager about that incident the response was to get over it. Neither sympathy nor understanding was shown to him by the respondent. Towards the end of the year he felt he was "losing the plot" as the pressure and behaviour from that manager was relentless and aggressive. He again told the managing director of his complaints and concerns as his stress levels increased.

That situation with work and particularly with the project manager showed no sign of improvement in the early months of 2010. Just before the Easter break there was another unpleasant encounter with that manager. By that stage the claimant realised he needed professional medical attention and visited a doctor. He was given a week off work but by the end of that week the prospect of returning to work made him sick. His general practitioner then declared him unfit to return. There was email correspondence between him and the general manager around this time and the claimant commented that the contents of one of those emails from that manager, was untrue and inaccurate.

These two men met on 29 April when the general manager told the claimant that he was unwilling to do anything about his fellow director as "he takes in so much money". The general manager then offered the claimant alternative roles within the company that included taking on the job of a "snagger" or performing administrative tasks in the office. Since both roles were unsuitable to him and both entailed being overseen by the project manager the claimant felt unable to accept those alternatives.

There was no clear outcome to that meeting and as the health of the claimant was still poor he did not return to work. He continued to submit medical certificates up to August 2010 when through his legal team he effectively left his job. He told the Tribunal that had the issues been properly addressed and resolved with the respondent he would have stayed on in employment there.

The claimant's G.P. told the Tribunal that the claimant presented to her clinic in April 2010 in a very distressed condition. He was pacing the floor, his eyes were bloodshot, he had trouble breathing and he told the G.P. that he was under a lot of pressure in work. The claimant was concerned about safety at work, he could not sleep because he was worried about accidents and projects, he also felt threatened in himself and described being bullied. The G.P. certified the claimant as unfit for work due to work related stress and prescribed medication.

The G.P. had known the claimant for 10 years and had never seen him so agitated before, he was normally a very calm person. Despite the claimant's financial situation the G.P. felt that the claimant should have a break from work and recommended counselling. However it was another six months before the claimant was well enough to attend counselling.

According to his G.P. the claimant is now fit to return to work but not for the respondent.

The claimant told the Tribunal that there was nothing other than work causing his stress and denied ever telling TOD that he was having personal problems.

Respondent's case

The Managing Director for the respondent (TOD) hired the claimant as a supervisor in 2003 and regularly worked with him without any issues. The claimant was responsible for Health & Safety and Quality Control along with keeping things moving.

Prior to 2005 there was no written contract of employment but everyone was aware of their job description. The claimant was involved in a case with the Rights Commissioner and TOD was sure that he was aware of the grievance procedure. TOD was not aware of any difficulties the claimant had with the contract of employment and was not aware, until a month later, that he would not sign the contract.

The company did good quality work and did not cut corners. If the claimant needed extra workers he was given them. If there were any problems they were addressed at the monthly meeting. All the supervisors were given lap-tops in order to do required paper-work and as far as TOD was concerned this made the job easier. TOD was sure that the claimant was competent in the use of the lap-top as he had received e-mails from the claimant.

TOD had an argument on a site in Killarney in 2006 with the claimant over painters wanting to leave on a particular Saturday when the customer wanted to move in the following Monday. The claimant left the site but returned later and helped out with the painting. TOD forgot about this

afterwards and never raised the issue again.

There was no indication of difficulties between the claimant and the other Director (CS) and it was never raised as an issue at the monthly meetings.

In December 2008 there was a disciplinary meeting with the claimant and he told TOD that he had missed things because he was having personal issues. The work improved after that and there were no more problems.

In October 2009 the claimant was responsible for three sites and told TOD that he could not cope with this. TOD took one site (Togher) away from him and the claimant said he could cope with the other two. TOD denied intimidating the claimant.

On 26th April 2010 the claimant contacted POD and requested a meeting. They subsequently met and TOD was shocked at how the claimant looked. The claimant said that CS was too tough on people and enquired about the job of purchasing. TOD did not think that the claimant would be up to that job and suggested "snagging" instead. TOD asked the claimant what he wanted and the claimant said "pay me redundancy or I will sue you, I need money, you will get 60% back". The claimant said this as he was leaving the meeting and TOD was not sure what the outcome of the meeting was but knew that the claimant was not well.

TOD phoned three other supervisors and enquired as to whether they were having difficulties with CS and was told that they were not having difficulties with him. He did not think that the claimant was finished with employment and expected him to return to work at some stage but had to get someone else to replace him in the meantime.

Another Director of the respondent (CS) who is also a Project Manager gave evidence to the Tribunal. CS told the Tribunal that there were a lot of difficulties with a site in Collins Barracks but he did not cut corners or work for no profit.

CS was not aggressive towards the claimant and did not roar and shout at him. He may have told the claimant to hurry up but had a good relationship with him. CS specifically denied being aggressive towards the claimant on a hospital site said that there was no lack of workers on that site as there were four or five lads there at any given time.

It came to the attention of CS that a colleague of the claimant had made a racist comment towards the claimant. CS discovered this when the claimant refused to have that employee working with him on the basis of what he had said. CS subsequently spoke to the other employee who said that the comment was not made directly to the claimant but that he had overheard it. CS told that employee that he should not have said it at all.

A customer complained that there was nobody at a site for which the claimant was responsible. CS called to the site and observed two workers inside the house and two outside. When he asked the claimant about the rest of the workers the claimant said "they're not here, what is the problem?" This made CS cross and he shouted at the claimant.

It was put to CS that he was very demanding and put pressure on the claimant and CS denied this saying he had discussions about how to do things quicker and easier and that he made suggestions. The claimant never told CS that he was stressed. However TOD had told CS that the claimant was having personal problems and asked him to help out. CS then visited sites more often. CS was not

aware that staff at the hospital site had asked the claimant was he alright. There had been a conversation beside the shaft between CS and the claimant but this was not a heated discussion.

There are now grievance procedures in place at the respondent and these include bullying and harassment procedures. There is a specific person designated to deal with such issues.

Determination:

The claim under the Organisation of Working Time Act, 1997, is dismissed because it was not established to the satisfaction of the Tribunal that there had been any specific breach of the said legislation for which the Tribunal could make any definite compensatory award.

Regarding the unfair dismissal claim, the Tribunal gave the matter very careful consideration. The claimant appeared to have been of a nervous disposition and might not have been the most resilient employee to have worked in the sometimes rough-and-ready sphere that is the construction industry but, once the respondent had taken him on, it had a duty of care to him even if it might have been thought that the claimant was not suited to the work expected of him. The Tribunal was not satisfied with the respondent's treatment of the claimant. The Tribunal considered the claimant's medical situation and found that the illness suffered by him was work-related. The Tribunal was not satisfied with the respondent's procedures for dealing with how the claimant felt that he was treated. The claimant felt that no attempt was made to address concerns that the respondent did not deny him to have expressed. The Tribunal acknowledges that the claimant had particular difficulty with work that others might have found less onerous but the Tribunal does not accept that this absolves an employer of all responsibility towards its own employee. On the evidence the claimant established enough grounds to show that he was constructively dismissed. The respondent cut corners and the claimant was not treated right even if it appeared that the claimant was a square peg being put into a round hole. Eventually he became ill for a protracted period and his medical advice was that he should not return to the respondent.

In all the circumstances of this case, the Tribunal unanimously allows the claim under the Unfair Dismissals Acts, 1977 to 2007, and unanimously deems it just and equitable to award the claimant the sum of €20,000.00 (twenty thousand euro) in compensation under the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)