

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD1519/2003

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Mr. M. Forde
Ms. H. Kelleher

heard this claim at Waterford on 14th November 2006 and 18th December 2006

Representation:

Claimant(s) : Ms. Marguerite Bolger B.L. instructed by Ms. Bernadette M. Cahill,
B.M. Cahill & Co., Solicitors, 14 Catherine Street, Waterford

Respondent(s) : Mr. Mark Walsh, Peter O'Connor & Son, Solicitors,
Wyse House, Adelphi Quay, Waterford

The determination of the Tribunal was as follows:-

Preliminary Issue:

At the outset, counsel for the claimant raised a preliminary issue regarding the ending of his employment. The Tribunal invited the claimant to adduce evidence on the preliminary point.

Giving evidence, the claimant told the Tribunal that he commenced employment with the respondent in 1995. He was called to meetings on the 11th and 17th April 2003 and was suspended from duty pending an investigation on the 22nd April 2003 by letter. This was the first document he received regarding the respondent's allegations.

At a meeting on the 25th April, he was encouraged to resign from his position. He was told that there was an envelope on the desk and if opened would have grave consequences for himself. He was asked to sign a statement containing the "facts" of the evidence against him for "damage limitation". The claimant didn't agree with the statement but signed it to save his job. He assumed it would end up in a final written warning. After discussion with his colleague, who was present at the meeting with him, he decided that he had no other option but to resign. He drafted the letter of resignation and offered it to his manager. This letter was rejected and on the 28th April a further letter of resignation was offered for his signature. He did not want to leave his job but felt he had no other alternative.

Under cross-examination on the preliminary issue, the claimant told the Tribunal that he never agreed with the allegations made against him. He had agreed at meetings and in a written statement to procuring items on the company account for personal use. He had been under duress to sign. He tendered his resignation because he had no idea what the envelope contained and he wanted to save his job.

Having heard the evidence on the preliminary point, the Tribunal decided to hear all the evidence before deciding any issue.

Respondent's Case:

The first witness was an electrical technician (JC). He told the Tribunal that was employed by the respondent for six years. The claimant was a senior manager. In December 2002 the claimant approached JC on four or five occasions with regard to the heating system in his house, spotlights and other maintenance problems he was having. There was a problem with the timer on the boiler in the claimant's house and he asked JC to get a new one for him. JC ordered this through the company account.

JC and the claimant went to the claimant's house on a lunch break and installed the new timer. The claimant had cleared JC's absence with his supervisor. It was the first time he had done anything for a manager within working hours although it was not unusual for managers to approach him with different queries. JC carried out other jobs in the claimant's house and these were all done within working hours.

The operations manager (TR) approached JC in April 2003 and requested him to attend a meeting and to bring his union representative. On the 8th April, he attended a meeting and was questioned about his work in the claimant's house and the items he ordered through the company accounts. He knew the claimant was under investigation. TR and the Human Resources (HR) director (JL) were present at a meeting on the 11th April when JC was asked for more details. He detailed particular times and work carried out. The claimant had contacted him to ask him to change his story to a "misunderstanding". At that stage JC did not want to have any further involvement with the matter.

Under cross-examination, JC told the Tribunal that he was still employed at the respondent company. The claimant had asked him to order the parts through the company. There was no mention of reimbursement. He was not asked to sign a statement but would have had no problem signing one had he been asked. JC was not asked to attend a meeting with the claimant. He did not recall details of the conversation with the claimant where the claimant asked him to change his story. At the end of the meetings with TR and JL, minutes were read back to JC and he agreed they were an accurate reflection of the meeting. He received no copy of these minutes, nor did his representative.

The second witness for the respondent was the operations manager (TR). He told the Tribunal that he had been employed by the respondent since 1977. He appointed the claimant to his position and knew him for over ten years. They had worked together on a number of projects. The claimant was an excellent and reliable employee. He was very diligent and competent at his job and there were no problems until this sequence of events. The claimant was responsible for the most technically demanding section of the company. While they worked as colleagues, TR was the claimant's supervisor.

In April 2003, the technical manager brought it to TR's attention that there was an item charged to the company account that had no reason to be there. The item did not belong to any machine in the

factory. TR had a one to one meeting with the claimant in the claimant's office on the 8th April. He pointed out the discrepancies on the invoice and the claimant did not seem to see any difficulty. The claimant found it difficult to understand what the "big deal" was as he had always intended to pay for it. Before the matter became formal, TR advised the claimant to get a representative.

The purpose of the meeting on the 11th April was to investigate the reason for the procurement of the items. The claimant assured him at this time that there was nothing else he needed to know. JC submitted a further statement at a later stage itemising the hours and equipment involved in the matter. TR put this to the claimant at a meeting on the 17th April. The claimant accepted what JC had submitted but did not see the significance of it. At a meeting on the 21st April, TR asked the claimant if he had approached JC regarding "his story". The claimant confirmed he had and TR suspended him while the investigation was continuing.

TR had a further meeting with the claimant on the 24th April as "more and more" evidence was coming to light. At the end of each meeting, TR would read back the minutes and the claimant would agree them. JL, TR, the claimant and his colleague (SJ) were present at these meetings. At all times it was difficult to get to the facts of the matter with the claimant. The claimant was given the weekend to consider his situation and reflect on the evidence presented to him. There was no decision made at that point regarding the status of his employment. The claimant offered a resignation letter on the 28th April. TR had difficulties with this letter as the claimant did not accept responsibility for his actions therein. He offered a subsequent letter. TR did not agree that the meetings were intimidating for the claimant as they were conducted in an investigative manner.

Under cross-examination, TR told the Tribunal that there was an "errand boy" employed by the company to carry out small tasks off the premises for employees. This was a useful service and could be availed of by all employees and managers. There were no written procedures to use this service. The claimant would be out of the country on occasion with work and sometimes up to two weeks at a time. TR understood that this would have an impact on family life. It was not unusual for the claimant to liaise with the managing director on a particular project without TR's involvement.

The claimant had a few hours' notice of the meeting on the 8th April and this was not in writing. TR did not activate the disciplinary procedure against the claimant because the claimant resigned during the investigative procedure. The claimant did not believe he had done anything wrong. TR was not aware that the claimant had not received a copy of the code of conduct. He did not furnish one to the claimant. At the meeting on the 8th April, the claimant was aware that this process could culminate in the termination of his employment. SJ did ask questions at the meetings but was not qualified as a union representative.

The claimant asked TR if he could speak to JC regarding the matter and TR refused. It was not company policy to ask people to sign statements. The claimant was not told that the "errand boy" and JC's supervisor had been interviewed as part of the investigation. The company did not ask for the claimant's resignation but did nothing to dissuade him when it was offered. His original letter stated that he had been forced to resign and TR could not accept that. TR did not know what the alternatives were to the situation that the claimant found himself in. As a senior manager, the claimant would have been expected to know the rules and regulations governing the company.

The third witness for the respondent was a technical manager at the company (SJ). He had been employed since April 2003. He was contacted by the claimant who asked him to sit in on the meetings he was attending. SJ told the claimant that he had never done anything like this before and the claimant was surprised. SJ had enjoyed working with the claimant and they had numerous technical conversations regarding the machinery in the factory. SJ took notes and gave them to the

claimant at the end of each meeting. Allegations were put to the claimant at each meeting and the claimant negated them. SJ did not see the allegations as being particularly serious. The allegations came out in stages over three meetings. SJ was present when the claimant signed the statement. The claimant made it clear at that stage that he was not happy to sign. SJ did not attend the meeting on the 28th April where the claimant tendered his resignation.

Under cross-examination, SJ told the Tribunal he attended the meetings to “bear witness” for the claimant. Any advice he gave the claimant was purely his opinion. SJ agreed that the claimant saw nothing wrong in his actions. The claimant was aware that his job was on the line and was duly concerned.

The fourth witness was the HR manager (JL). He had been employed by the company since 1987. In April 2003, he and TR conducted a number of meetings with the claimant of an investigative nature. The investigation was into allegations that had been made of misappropriation of a company employee’s time and company property. As the meetings progressed, more and more evidence emerged. The claimant had agreed that he had procured the items in question. JL and TR accepted the claimant’s resignation and paid the claimant three months’ notice as per the terms of his contract. The claimant did not contact JL after this meeting or offer to pay for the items.

Under cross-examination, JL told the Tribunal that he had numerous qualifications and was an experienced practitioner in human resources. The investigation procedure had been agreed with the union many years previously. The claimant was not a member of the union. There was no investigative procedure outlined in the claimant’s contract of employment. The claimant had been coached in investigative procedures as part of his position of team leader. The claimant had the opportunity to cross-examine the investigation team but not the individual witnesses as it would have been intimidating for an employee to be questioned by a senior manager. JL did not ask JC if he would agree to be questioned by the claimant. JL did not think that a signed statement from JC was relevant.

JL believed that the investigation was fair. JC’s allegation regarding the claimant contacting him during the investigation was never put to the claimant. He was aware that the claimant was concerned about his future at the company. JL did not recall the claimant stating he was unhappy to sign the statement but did recall him stating that his job could be on the line. JL never suggested that the claimant should resign but agreed that the claimant was desperate at that time. On answering the Tribunal if he believed that the claimant thought that he was going to be dismissed, JL answered “yes”. JL was of the opinion that SJ attended the meetings as the claimant’s representative.

Claimant’s Case:

The claimant gave evidence on the circumstances surrounding his resignation from the respondent company. He outlined his duties broadly to the Tribunal. He started out in the company managing two employees and finished by managing over one hundred. He introduced new manufacturing and moulding methods to the factory and his management style was friendly and team-based to get the employees to deliver on the new methods. In the first three years of his employment, he was rarely at home as business needs required him to travel extensively. He spent a lot of time travelling to the Far East, up to three weeks at a time. The impact of this travelling was strenuous on his family life. When he mentioned to TR that he was having personal difficulties, TR told him to cut down on his hours. That was the only response he received.

The “errand boy” was available for everyone at the company for both official and personal use. The claimant had approached JC in the same manner. As a senior manager he had his own style and was

given the freedom to run things his own way. He had increased output from 41% to 82% and he worked up to sixty hours per week. He didn't expect JC to use up holidays while doing an errand for him and that was why he brought him to his house on company time.

He had never received a copy of a code of conduct from TR. He did not know it existed as it was never mentioned. He never got involved in investigations and was never coached in how to conduct them. On the 8th April, the claimant was expecting a visit from the managing director. He had worked the weekend in preparation for this visit. Thirty minutes after the visit, TR came into the claimant's office. He was asked if he knew anything about a piece of equipment. The claimant denied all knowledge, he did not know what TR was talking about. During the discussion, the claimant became aware that TR was talking about an item in his house. The claimant could not understand why it was bought on the company account as it had nothing to do with the company. The meeting lasted about fifteen minutes.

The claimant had previously mentioned to JC that the timer was not working on his boiler and JC had offered to "take a look". He then procured a timer and fitted it for the claimant. The claimant never expressly told JC that he would pay for the timer but he expected it to be understood. It was a misunderstanding to order it through the company. TR left the office after this discussion and no documents or invoice was proffered to the claimant. The claimant left it for a couple of days and then approached TR to enquire what the situation was. He said he'd get back to the claimant. There were rumours going around at the time regarding the investigation and the claimant was not comfortable doing his job.

JL approached him on the evening of the 10th April and told him there would be a meeting the next day and to bring a friend. JL said that it would be an informal meeting and all would be "sorted out" at this meeting. Initially, the claimant did not think that it was a big deal. At the meeting, JL said that the claimant was under investigation for the misuse of management powers. If the claimant did not admit the offence it would result in a messy investigation. JL said it was better for the claimant to admit it now and the claimant felt threatened. At this point he realised the matter was very serious. In his opinion there was a hidden agenda. The investigation started at that meeting. He outlined the occasions that he had used JC for different work in his house. All of the evidence came from the claimant's mouth.

The following meeting was on the 17th April after the claimant asked again what was happening. He felt embarrassed and dejected. Everyone in the company knew what was going on. At this meeting, he started out by admitting to committing the offences and agreed with all that was alleged. At the end of the meeting he asked for the minutes which he never received. On the 22nd April, he was called in again and they went over the same allegations. The claimant was suspended at this meeting. The document he received at this meeting was the first document received throughout. It was obvious to the claimant that JL and TR were not interested in what he had to say.

On the 24th April, there was another meeting where the claimant was told that a decision had been made and the company knew the action they wished to take. The investigation was complete. The claimant asked to speak with the managing director on the matter and was refused. The claimant knew that there was no chance of keeping his job and he signed the document on the chance that it would result in a final written warning or a "slap on the hand". He believed that this was the quickest way to end the matter and get back to running the business. He signed it under duress.

On Friday 25th April, the claimant was called back into the office and TR showed him an unopened envelope. He was told that as he had signed and admitted to the offences, the decision had been made. If the envelope was opened, there was no going back. The claimant was under the

impression that this was a letter of dismissal. He felt “gutted” and was overcome with disbelief. The claimant still felt that he had not acted outside the normal custom and practice within the respondent company. No other sanction for his actions was ever mentioned or discussed. For damage limitation, he agreed to resign on the condition that he received the three months’ pay under the terms of his contract. He felt he had nowhere to go and it would be very difficult for him to get another position in his technical speciality. The claimant since relocated to another country and he established loss for the Tribunal.

Under cross-examination, the claimant told the Tribunal that he thought there was a hidden agenda because as soon as he admitted to the allegations, it led to his dismissal. He believed it was acceptable to ask an employee to go to his house because it was a give and take system at work. If he thought otherwise it would never have happened. He felt that the meeting where he submitted his resignation had a predetermined outcome. The second letter of resignation was given to him, he did not write it himself. He had a good relationship with TR but towards the end the relationship became hostile. The claimant thought it was something to do with his hands-on management style.

Determination:

The Tribunal considered all of the evidence adduced and submissions made by both parties to this case. The Tribunal accepts that the claimant believed that he would have been dismissed had he not submitted his resignation. When he signed the statement of admission, he was under the impression that this would lessen the sanction against him and save his job. In his naivety, he believed that what he did with company property and an employee’s time was not incorrect.

At no stage did the respondent ask for payment for goods and services that the claimant procured. The Tribunal believes that the sanction taken against the claimant was the most severe and he tendered his resignation under extreme duress and desperation. The Tribunal finds that there was no option within the company procedures for the claimant to do otherwise than resign, thus constituting a constructive dismissal. However, the actions of the claimant contributed to the process which led to his eventual constructive dismissal.

Therefore, the Tribunal determines that the claimant was unfairly dismissed and awards him the amount of €17,500.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)