

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Daniel O'Gorman- *claimant*
Hillside Cottage, Castlolumney, Dunleer, Co Louth

CASE NO.
UD2314/2010

Against

Glen Tyre Company Limited- *respondent*
Convent Lane, Balbriggan, Co Dublin

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N O'Carroll-Kelly BL

Members: Mr A O'Mara
Mr O Nulty

heard this claim at Drogheda on 20 September 2012 and 20 November 2012

Representation:

Claimant(s): Ms Cathy McGrady BL, instructed by:
Ms Sharon Devine,
Brian D O'Brien & Co
Solicitors, 23 Main Street, Swords, Co Dublin

Respondent(s): Mr Patrick Reidy,
Reidy Stafford, Solicitors
1-3 Moorefield Terrace, Newbridge, Co Kildare

The determination of the Tribunal was as follows:-

Background:

The claimant was employed as a mechanic by the respondent company from October 2006. On 11 May 2010 he went on sick leave and did not return to work. He resigned by letter dated 8 September 2010.

Determination:

The claimant is alleging he was constructively dismissed from his employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

“the termination by the employee of his contract of employment with this employer whether prior notice of the termination was or was not given to the employer in the circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer.”

The burden of proof, which is a very high one, lies with the claimant. He must show that his resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the Tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the Tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to terminate the contract was a reasonable one.

The claimant made his claim for constructive dismissal under three separate headings:

- Excessive workload,
- Exclusion,
- Being subjected bullying, harassment and aggressive behaviour.

It is important to note from the outset that the claimant suffered from a syndrome known as Asperger Syndrome (A.S.) which falls into the category of autism spectrum disorders. From the evidence it was clear that the claimant was extremely intelligent and talented when it came to anything mechanical. However, for the normal day to day challenges life brings he relied heavily on his parents. The claimant’s father spoke to the employer at length prior to the claimant commencing his position with the respondent company. The purpose of the conversation was to inform or educate the employer in relation to A.S. and the challenges that that brings. The claimant commenced his employment in October, 2006 and worked without issue for a period of three years.

In March, 2009 the claimant suffered a personal injury at work when he was struck on the head by a tyre. He was certified unfit to work the next day but despite the certificate he attended for work as he was anxious to finish a car he was working on. There was a second incident when a tyre exploded in the vicinity of the claimant which caused his hearing some short term temporary distress. The claimant did not raise a formal grievance with the respondent company in relation to either of these incidents nor did he bring a personal injury claim.

There were several incidents where the claimant felt that inappropriate language was being directed towards him and on several occasions he felt that his employer personally belittled him by calling him, for example, “fucking stupid”. The employer stated in evidence that on occasion inappropriate language was used and that he did give out the claimant when things

were not being done. He stated that there were times that he just had to be the boss and he did not make exceptions for the claimant when his orders were not being followed. He explained to the claimant that on occasion he had to “be the boss” and that it was not personal. The employer should not be expected to make exceptions for the claimant when it came to matters of business. However, knowing how sensitive the claimant was to reprimand the employer could have taken a more gentle approach.

The claimant felt that he was being excluded. He gave an example that when his work colleagues would go for lunch nobody would call him and he would be left alone to work through his lunch. It is important to note that time means nothing to the claimant and a lunch hour could come and go without the claimant noticing. He would have to be called for his lunch otherwise he would not have known that it was lunch time. There probably were times when the employer or his employees neglected to call the claimant for his lunch but the Tribunal finds that there was no malice involved. The employer stated that he worked one on one with the claimant on most days and that he gave him as much of his attention as he could and if anyone was being excluded it was his other staff members.

When it came to including the claimant in staff activities, the employer made exceptions for the claimant. He did so due to the fact that he thought highly of him and knowing about A.S. One example of that was the Christmas party. The respondent’s staff planned a night out at the dogs. The claimant stated that he had no desire to go to the dogs as they did not interest him, so the employer organised a meal at a local Italian restaurant that the claimant liked. The employer, his staff, the claimant and his father attended for the lunch. The Tribunal notes that the claimant’s father paid for the meal.

The claimant stated that he felt that the employer kept increasing his work load to the point that it was impossible for him to complete the work in any given day. When the work was not completed he stated that the employer reprimanded him and sometimes did so in a personal way and in front of other staff members. The employer stated that the claimant was so passionate about his work that sometimes he would get lost in it trying to solve problems that were outside his remit. He said that he found this frustrating and that he did have to reprimand the claimant from time to time. He also admitted that his choice of language could at times be colourful. The employer is within his rights to reprimand the claimant for not following orders, however, he should not have been reprimanded in public or in front of other staff members. To do so runs the risk of humiliating the claimant.

The claimant left his employment in May, 2010 and did not return due to stress, which both his parents and his GP say was work related. The employer stated that he did not know that the claimant was suffering from work related stress until the second sick certificate came in. The claimant stated that there was no contact with the employer after that. The employer stated that he did try to contact the claimant’s father on several occasions.

It is crucial in a constructive dismissal case that the claimant informs the employer fully of the complaints being made against him and that the employer be given an opportunity to resolve the issues. In this unusual case, the claimant’s parents had a duty to inform the employer why the

claimant was suffering from stress and should have informed him that the claimant felt he was being subject to behaviour that amounted to bullying, harassment and exclusion. Their failure to do so left the employer powerless to rectify the situation.

Unfortunately the burden for the claimant is an extremely high one and the law makes no allowances, rightly or wrongly, for claimants who suffer from A.S. The claimant must show that there has been a significant breach going to the root of the contract, which said breach would prevent the claimant from carrying out his contractual duties. The Tribunal can find no evidence that there was such a breach of the claimant's contract.

The Tribunal has examined the conduct of both the employee and employer together with all the circumstances surrounding the termination. Having done so cannot establish that the claimant's decision to termination the contract was a reasonable one.

The Tribunal has an enormous amount of respect and admiration for the claimant and what he has achieved but is bound by the law and therefore finds that the claim under the Unfair Dismissal Acts, 1977 to 2007, must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)