

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO.
UD495/2006
MN313/2006
WT154/2006

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL
Members: Mr. J. O'Neill
Ms. E. Brezina

heard these claims in Dublin on 3 October 2006 and 8 December 2006 and 19 December 2006

Representation:

Claimant: Mr. Marcus Dowling BL instructed by Mr. Ian O'Herlihy, Arthur O'Hagan,
Solicitors, Charlemont Exchange, Charlemont Street, Dublin 2

Respondent: Mr. Joseph Bolger, Employment & Safety Associates, The Novum Building,
Willsborough, Clonshaugh Industrial Estate, Dublin 17

The determination of the Tribunal was as follows:

This was a case of constructive dismissal.

Claimant's case:

The respondent owns a wholesale beauty business which distributes to the beauty industry in the north and south of Ireland. The claimant commenced employment with the respondent on 13 July 1993 in an administrative role which included invoicing and filing. In 2001 she became the General Manager and was responsible for the day-to-day running of the business. As General Manager she was second-in-command to the Managing Director who was the majority shareholder (the employer) in the respondent company. The employer looked after the finances and the claimant was responsible for the day-to-day running of the company including the staff. At the end of 2004 she became managing director.

In October 1996 a relationship began between the claimant and the employer. They became a fully-fledged couple around the end of 1998 or the start of 1999. The claimant had bought a house and the employer moved in with her.

In April 2001 the employer offered the claimant a new package which included an offer of share options at a discount as well as an offer to install her as a 3% shareholder of the respondent company (at no cost to her), which at her request was increased to a 5% shareholding. The employer made this offer in a letter dated 30 April 2001. The claimant insisted that (although she had on occasion under the employer's instruction signed his signature to documents) the contents of the letter of 30 April 2001 and the signature on it were his and not hers. She agreed that the said letter was on un-headed notepaper and assumed that the employer had typed it up himself in order to maintain privacy.

The employer had visited her in her home during her sick leave to discuss these issues. She wrote to the employer on 4 May 2001 recounting their agreement. The shares were never given to her and she had instructed her solicitors to institute proceedings in the matter. The claimant signed the Statement of Main Terms and Conditions of Employment on 7 July 2001. In cross-examination the claimant agreed that shares were not referred to in the (latter) document. It was only when she engaged Peninsula Business Services that the employees got the written Statement of Main Terms of Employment.

The claimant received part of her salary through the books and the balance as an end-of-month payment. In 2003/2004 the employer decided to pay less of the claimant's salary through the books so as to reduce the PRSI burden on the company. She was to get the balance of her salary as expenses or end of month payments. This was initially done but after some time the payments did not come through. The claimant did not worry about this as the respondent had cash-flow difficulties and as they were a team and she felt that everything would be sorted out. She wanted the company and the other staff to be looked after. When she broached the subject the employer reassured her that everything would be fine.

The respondent had problems paying suppliers and the Revenue Commissioners and the latter were threatening to put a hold on the company's accounts and on MD's personal accounts. The claimant gave the employer a loan of €47,280.00 which she had received on foot of an insurance policy; the loan was to be repaid in two weeks. This money had never been repaid and it is the subject of High Court proceedings. Other contractual entitlements due under the 2001 agreement are also before the High Court. Although the respondent was experiencing annual growth it was under strain as the employer was buying other properties and opening salons. The employer's other companies were "bleeding" the respondent; it was paying their bills and salaries.

In April 2005 they moved into a new home which the employer had built. In mid August 2005 the employer read a text on her mobile and this precipitated the break-up of their relationship. She moved out of their home on 15 August 2005. However, she continued to go to work every day and fulfil her duties but she had increasing difficulty with the manner in which the employer was treating her: he raised his voice to her several times and, using foul language, that that she was no good to the company and that he wanted to see the back of her. Then he stopped communicating with her. She attended a doctor and was out of work on sick leave from 20 September to 4 October 2005. Her pay was stopped during her sick leave and her mobile phone was disconnected, neither of which had occurred during her previous absences. She was very upset.

The claimant returned to work on 4 October 2005. She raised the issue of her sick pay with the employer and he eventually paid it and raised her salary at the same time. Between 5 and 13 October 2005 the claimant sent a series of eight emails to the employer requesting that her mobile be reconnected, the return of some paperwork she had given to the employer; the reinstatement of

her full-time salary (now that she was full-time in the office) and other matters. In some of the emails the claimant also referred to their personal matters and requested a meeting with a mediator at which she also hoped to deal with her pension. Her mobile was reconnected by 11 October but before this the employer told her that she had no need for, nor right to, have a mobile phone and told her to use the pool phones. She could not remember if the employer replied to her emails but she certainly got no response of any substance. She was refused a laptop as well as a 3G card for internet access and was told she did not need them although all members of management were provided with them. She bought her own laptop and 3G card..

From 15 August 2005 the employer rarely spoke to her and when he did it was in monosyllables and an aggressive tone. The other staff members knew she was being isolated and felt nervous. The atmosphere became progressively more difficult to work in. She tried to communicate with the employer but he would not respond to her; he was communicating with the staff and bypassing her. She felt isolated.

She had worked for the respondent for over twelve years. She loved the job and the people. She had been led to believe that she was a figurehead in the respondent and she saw her future there. Things were happening that she did not know about and into which she would have had input in the past. Her sleep pattern was disturbed. The job she had worked in for so long, and which had been a keystone of what she was, was being destroyed. She felt that all that was happening to her was due to her personal life.

Due to stress the claimant had a breakdown and was hospitalised from 7 November 2005 to 19 January 2005 under the care of a consultant psychiatrist. She had delayed her admittance to hospital by about a week until 7 November because she felt that she had to cover for the employer who was out of the country. He ignored her when he returned to the office on 4 November. Although the employer knew she was in hospital he called her and asked her what she thought she was doing. Her psychiatrist had instructed her not to take phone calls from him.

The employer wrote to the claimant on 23 November 2005 stating:

“We are in receipt of medical certificates that have declared you unfit for work on the grounds of ill health. Naturally, we wish you a speedy recovery and a healthy return to work. In the interim we must advise you that you are to continue to submit medical certificates on a weekly basis until properly certified by your doctor to return to work. As you are aware from the policies and procedures that you yourself introduced to the company we do not pay sick pay, but we do reserve the discretion depending on the circumstances of the individual to make some form of contribution. To this end we have been paying you, however giving (sic) the circumstances that we find the company in we would advise that this has been discontinued and we would ask you to submit any social welfare payments that you have received up until 7th November and thereafter you are entitled to retain those cheques.

We would ask you to bear in mind the fact that prior to your illness the company uncovered some serious irregularities in its operational dealings and to this end it is imperative upon your return that you make yourself available to assist the company in establishing the reasons and causes for these matters. In the mean time (sic) however please concentrate on your health and we await your return.”

The claimant could not understand the latter paragraph. Her pay was stopped in November 2005.

Her medical advisor advised her that it would be detrimental to her health to go back to work. She terminated her employment in January 2006.

Under cross-examination, the claimant accepted that she had agreed to have part of her salary paid in cash; she had wanted the job and had felt that she would not get it unless she accepted the cash arrangement.

On occasions she might come in late if she had been at site meetings in the morning or “pop” out for a few hours to do things for the employer but she spent some time in the office every day unless she was abroad. The management team helped her. She attended meetings with them on a regular basis where they discussed upcoming and recent business and she helped them make decisions. When she became Managing Director at the end of 2004 SM was made General Manager.

She had to divide her time between the employer’s other businesses, managing the respondent’s business and looking after his children. The work on his other projects became progressively more time-consuming. When they were building their new home she was meeting architects and designers as well as decorating it. The employer travelled a lot out of the country and many of the important decisions were left to her. She was straining “at the gills” to do everything but she believed that it was for the best interests of both of them.

The respondent’s business continued to grow but there was a problem with its cash flow. In 2001 she worked full-time for the respondent. In 2003 and 2004 she had greater commitments to the employer’s other businesses.

She believed that their personal relationship was a long-term one and that they would marry and have a family. She agreed that she had accepted a new structure in her rate of pay in 2004. She paid for the day-to-day expenses incurred in running their home, their entertainment and his children. Under the employer’s direction she prepared spreadsheets of these expenses so he could repay her. These expenses were in no way related to the business and accounted for the cheques the employer paid to her.

She did not agree that the respondent’s business was in an awful state. Nor did she accept that the employer was panicking from 13 August 2005 on. Her decision to leave the respondent was a very difficult one for her but she had got medical advice to leave. She did not explain her decision to leave to the employer because she was not in a fit state mentally to do so. She had lived with the employer for six years and had had a relationship with him for eight years but did not have a reasonable conversation with him since mid-August 2005.

Long-serving employees would generally be paid while on sick leave. There was less discussion about it when somebody in management post was ill.

A handwriting expert, on behalf of the claimant, told the Tribunal that, having examined signatures, the signature on the letter of 30 April 2001 was, on the balance of probabilities, written by the employer himself.

Respondent’s case:

Giving evidence, the respondent’s Sales Manager (SM) told the Tribunal that she commenced

employment with the respondent on 26 March 2001. She had a very strong personal relationship with the claimant to whom she reported. From 2004 the claimant spent less time in the office because she was involved in the employer's other businesses. SM could not say how often she saw the claimant as she (the claimant) was not on set hours and was involved in the employer's personal projects, which could have taken up two days per week. She confirmed that the claimant met management team (HR manager, the Financial Controller (FC) and the witness) every Friday and they discussed what had to be done. After some months, the witness realised that the claimant and the employer were in a relationship.

SM was office-based and did not have a laptop or a 3G card but she did have a mobile phone. She was in sales and was in a support role to the respondent's internal sales team.

She was on her honeymoon when the relationship between the claimant and the employer broke down in 2005. On her return to work on 22 August the claimant told her that there had been a row. The claimant was distraught. After that, the working relationship between the claimant and the employer was neither good nor bad but it was very strained and there was no real communication between them. She could not say who was responsible for the lack of communication between them as the employer "was not around much". SM did not see rows but she knew about them. When she visited the claimant in hospital she expressed concern about where she and her career were going.

SM knew that the respondent company was in financial difficulties and agreed that it was a "cash cow" for MD's other projects. The cash-flow problems were stressful for the witness but she kept going. The employer spoke to the witness about buying a shareholding.

SM and the claimant had remained in contact after the claimant left the company; they had dinner together, the claimant had visited her home and they had also exchanged some text messages. SM had told both the employer and the claimant that she did not want to get involved in the difficulties between them.

Giving evidence, FC (the Financial Controller) told the Tribunal that he commenced employment with the respondent in May 2000. He reported to the claimant "on pretty much anything and everything that related to the business". He did not know about the claimant's relationship with the employer until 2001.

The claimant was working full-time in the company until sometime in 2004 when she reduced her hours because of other commitments. As far as he knew the claimant was working on MD's external projects as well as looking after his home and children. She was doing part-time hours but was sometimes in for the full day. He felt that a pay reduction was discussed at some time but there was no agreement about it.

The respondent company grew significantly between 2000 and the end of 2002. Cash flow became extremely bad due to his other businesses. Some of the employer's other businesses were complementary to the respondent's business and it supplied a lot of its products to those businesses as well as subsidising the wages of their employees

FC was not involved in the purchase of laptops and did not have one himself. He left the respondent in February 2005. All the companies were on the same server. Whatever management accounts were produced were on the server. They were produced monthly. With a laptop someone could get into them if that person had the necessary access. Payroll and correspondence were also on it as well as sales and human resource information. These would be of interest to the claimant as

General Manager and she would have a genuine reason to want to get into the server. There were approximately thirty people working in the respondent company. About fifteen of these had server access. The stores department had limited access. The accounts department had full access. The previous witness, FC himself, a few others and HR had access. Between 12-15 employees, who are in sales or management, had mobile phones.

The employer, in his evidence, told the Tribunal that he did not change the claimant's salary so that she had to take part of it in cash. The only change that occurred to her salary was when the claimant reduced her hours at work and he felt obliged to reduce her salary. He explained to her that this would put a financial strain on the company and she agreed to reduce her salary. She never confronted him about the reduction. He did not know how many reductions there were as she was spending less and less time in the company. He never instructed her to look after her private affairs or properties. Nor did he request her to help with household chores. She wanted to spend more time at home. She helped with his children when they came over at the weekend and on occasions she cooked for them.

When he first met the claimant he had recently separated and was living in an apartment in the city centre and the claimant was living at home. She then bought a house for herself and later with his encouragement she invested in an apartment near him. He contributed towards the cost of the apartment at the time.

The company was growing between fifteen and twenty per cent per annum from 2000. In the last two to three years it was brought to his attention that the company was struggling. They had difficulties with creditors and received attachments from the Revenue Commissioners regarding the accounts. He entered into arrangements with the creditors to extend payments and he also entered an arrangement with the Revenue Commissioners. He became aware that the claimant was spending less time in work. She told him that she wanted to "step back" and have a family.

The employer explained that the claimant never had a laptop: the sales people had laptops and these had 3G cards for internet access via mobile phones. The claimant, SM and FC never had a laptop. He took the claimant's mobile after he read the text message on her mobile. He investigated her phone records and noticed a blatant abuse of the phone whereby she made numerous personal calls to the UK and these continued while she was out sick. At this time there was a financial blip in the company and the last thing he needed was bills for hundreds of euro per month for calls to the UK. There also was a blatant abuse of emails and the company phone. Under normal circumstances these would be a disciplinary matter.

Employees are paid for three-days sick leave and there is additional discretionary sick payment for managers. It was the claimant who had decided this. He did not pay the claimant while she was out sick in late September 2005. When she returned her salary for the period of absence was paid and he got her mobile phone reconnected. The 3G cards were ordered for the sales staff and the claimant took it upon herself to take a card that she had ordered while she was out sick. She did not work from home and therefore did not need a card.

The employer denied that the signature on the letter 30 January 2001 was his. The company shares had been offered to the claimant at a 50% discount. He had communicated with the claimant for several weeks after 13 August 2005 but when the conversation reverted to personal matters, as it frequently did he discontinued the conversation. The claimant was constantly interrupting his work with telephone calls. He did not reply e-mails from the claimant while he was in Argentina for a three-week break. He told her that he wanted her to continue in the job but that their personal

relationship was over. The company was in trouble and it was a big task to sort out its affairs. The claimant felt she could only return to work if they were in a relationship. He disagreed, as there was a job to be done and the claimant was very good at the job.

In cross-examination the employer told the Tribunal that he had renegotiated the claimant's salary in 2001 to bring it in line with the salary of the new sales manager. There was no issue about shares at that stage. He was prepared to offer a 10% shareholding of the company between the three managers, including the claimant but she could take whatever she wanted of that 10%; it would depend on how much she could afford. She did not want to pay anything for the shares. He has discussed a 3% shareholding with the claimant but they had not reached any agreement. These discussions took place around the end of 2004. The claimant had not taken any shares by 2005. He was adamant that he had not typed the letter of 30 April 2001 and that the signature on the letter was not his. He recalled the claimant giving him a piece of paper she had typed up around then and receiving her letter of 4 May 2001. He cannot remember replying to it but he would, at all stages, have said to the claimant that she would have to pay for any shares she took. They discussed the shares in 2001 and again in 2004/5.

The company was struggling in 2003 and 2004 as in two consecutive years made losses of €500,000 each year while the claimant was the managing director of the company. He asked the management team to make cutbacks. In August/September 2005 when the claimant was out sick he stepped back into the company and it was then that he realised the full extent of the problem: the Revenue Commissioners were owed more than €800,00 and creditors were owed more than €1m. Ultimately he had to inject €850,000 into the company. Any transfer of cash to his other companies was a very small part of the problem. He held extensive meetings about the company. He was not blaming the claimant for its problems, however she, as manager, was responsible for the company at the time. She came back from sick leave in October 2005, worked for three weeks and went sick again.

The difficulties between them arose because of the contents of the text message on her mobile phone. There were plenty phone calls between them after their break up on 13 August 2005. He had spoken to her about the company after their break up and told her that he needed her to sort out the problems in the company. He told her that he wanted her to continue in the job her job was secure, but that their relationship was over. She told him that she could only go back to the job if they were in a relationship. He never became annoyed with her or used foul or abusive language to her. They had several meetings. He tried to resolve the company issues but the claimant always introduced their personal problems. Whilst the claimant said she went back to work full-time after the break up he denied that she was there on a full-time basis during those weeks; she was "coming and going".

The claimant was not involved in his other properties. She did not meet the builders and such. When he was building his house she was only involved in the latter end when the decorating had to be done. He agreed that the claimant borrowed a large sum of money to furnish his villa in Portugal but he paid it back. Her input into decorating the property was negligible; she chose fabrics and colours. He had a person in Portugal managing the house.

He had stopped her pay and disconnected her mobile while she was out sick because of the circumstances of their break-up. However, having spoken with a director, who told him they needed the claimant in the company, the employer realised his error of judgment and when she returned to work he reinstated her salary and mobile phone. He did not know that she was hospitalised during her absence from November to January.

He was out of the office, on a trip to Argentina, for three weeks from around 14 October until 4 November 2005. When he returned to the office on Monday 7 November 2005 he went looking for the claimant but she was absent. He denied that he was in the office on 4 November as stated by the claimant in her evidence. While on holidays he was not responding to e-mails, particularly the claimant's emails. Some of her emails were "quite personal". He had felt totally taken for granted.

Determination:

The issue between the parties regarding the granting of shares is before the High Court. The claimant told the Tribunal that the share issue did not form part of the grounds for her claim for constructive dismissal.

One of the tasks for the Tribunal in this case is to distinguish between the difficulties caused for the claimant by the break-up her personal relationship with the employer and those flowing from the employer's alleged unreasonable treatment of her as an employee.

The Tribunal notes that prior to the break-up of their personal relationship in August 2005 the claimant had never disputed the manner in which she was paid but on the contrary had agreed to the arrangements made. Nor is there any evidence that she had raised any issues about the extent of her duties.

The employer responded to the issues raised by the claimant on her return to work after her absence on sick leave between 20 September 2005 and 4 October 2005. Her sick pay was restored in full and her mobile phone was reconnected. The Tribunal accepts the claimant was not entitled to have either a laptop or 3G card. The Tribunal further notes that during the period from 20 September 2005 and the date of her resignation on 13 January 2006 (due to the claimant's absences on sick leave and the employer's absence on holidays) both parties had only been together in the workplace for about nine days in early to mid October 2005. There was a conflict of evidence as to whether the employer called into the office on 4 November 2005. The Tribunal finds that matters at issue between the parties (apart from those before the High Court) had been resolved prior to her resignation. Whilst the employer did not pay the claimant during her final absence, which commenced on 7 November 2005, he was entitled to exercise discretion in that regard.

The final paragraph of the employer's letter of 23 November 2005, sent to her while she was on sick leave, stated:

"We would ask you to bear in mind the fact that prior to your illness the company uncovered some serious irregularities in its operational dealings and to this end it is imperative upon your return that you make yourself available to assist the company in establishing the reasons and causes for these matters. In the mean time (sic) however please concentrate on your health and we await your return."

The employer did not provide any details of any irregularities. The claimant did not know to what irregularities the employer was referring. This paragraph conveyed the clear implication that the claimant was somehow involved in serious irregularities of an unspecified nature regarding the operational dealings of the respondent company. No evidence was adduced at the hearing in this regard. Whilst the Tribunal must decide the claim for constructive dismissal on what was operating on the claimant's mind at the time of her resignation it can have regard to the latter fact as corroborative evidence. In the circumstances the Tribunal finds that the employer's conduct, in

referring to serious irregularities of an unspecified nature and doing so while the claimant was out sick due to stress, was so unreasonable as to justify the claimant's resignation and claim for constructive dismissal. The claimant's delay in resigning following the receipt of the letter of 23 November 2005 does not defeat her claim as she was under medical care during that time. Accordingly, the claim succeeds and the Tribunal awards the claimant the sum of €14,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2001.

No evidence was adduced in respect of the claim under the Organisation Of Working Time Act 1997 and accordingly the claim under that Act is dismissed.

The claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)