

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1039/2005

MN781/2005

WT347/2005

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 B.L.

Members: Mr G. Phelan  
Mr. T. Kennelly

heard this claim at Limerick on 5th October 2006  
and 13<sup>th</sup> December 2006

#### Representation:

Claimant: Mr. Gerard Kennedy, SIPTU (No. 1 Branch), Unit 4 Church  
Street, St. John's Square, Limerick

Respondent: Mr. Gerard Reidy, Wallace Reidy & Co., Solicitors, 24 Glentworth Street,  
Limerick

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute in this case.

#### **Summary of the Evidence**

The claimant commenced employment with the respondent in 1988 as a bookkeeper and sometimes she would also answer the phone and do administrative work. She worked afternoons from Monday to Friday and on Saturday mornings. She normally commenced work between 1p.m. to 2p.m. and occasionally later. She kept account of her hours and presented them to the respondent for payment. Shortly before the termination of her employment she asked to be paid by cheque only. At that time the respondent changed her hours to 11.00am to 5.00pm. The claimant and an auctioneer and valuer (AU) worked in the front office on the ground floor and Mr X worked in the rear office on the

ground floor. The respondent and his son, who was a full-time university student and worked in the office during his holidays, worked in the office upstairs.

AU commenced employment with the respondent in September 2003 and part of her work entailed showing property to clients. Initially AU and the claimant had a good relationship and on occasion they socialised together. The claimant's starting times became more irregular and when she began coming in later in the afternoon AU often had to cancel appointments or miss lunch break or have lunch in the office. When AU informally asked the claimant to come in on time she "mostly agreed but rarely did so".

Due to an increase in business the respondent took on a student (SU) on a year's placement in June 2005. The respondent asked the claimant to move upstairs as AU's and SU's duties required them to interface with the clients/public and there was no space downstairs. According to the claimant she did not want to move as she did not want to be on her own with the respondent upstairs and when he went out she would not know if she was locked in or not. According to AU the claimant was very adverse to the change and overreacted to it. AU had tried to explain the situation to her. AU considered the claimant a friend before this but the claimant's attitude towards her changed from June 2005 on and she felt that the claimant was holding her responsible for bringing in SU. The claimant told AU that she knew they were trying to get rid of her. The following day the claimant told her she was getting a job as a home help. AU had to be downstairs to deal with queries on rents and maps.

Shortly after SU began the claimant went on three weeks holidays. It was the claimant's evidence that before she left for her holidays she said to the respondent, "I know that you have enough of me and if you give me time I will leave". According to the respondent the claimant had said to him that she would be leaving three to five weeks after her holidays. On her return from her holidays, when the respondent enquired about her plans, she told him that she was to have an interview but that a pal "may have it sorted" and that she would be driving an ambulance. She also told the respondent that she had been suffering from depression but was getting it looked after.

After her holidays the claimant was upset and in a foul mood with AU because her files and books had not been moved upstairs as promised. AU explained to her that they had not been moved as they needed to know where they should be put and she offered to move them "there and then" with help from the respondent's son but the claimant told her that she would come back when "everything was right". The claimant arrived back the next day and was particularly aggressive and abusive towards AU and when they moved her files and books she just told them to drop them on the floor. Some days later (late July) the claimant was very upset in the office and they believed she had had a drink on her. On that occasion the claimant said to AU, "You have got what you wanted. You brought your girl in and made no provisions for me." She also said that both she and the respondent were stubborn but that she would kick and scream until she would get her way. The respondent and his son took her home on that occasion. According to both AU and the respondent's son the claimant did not want to move upstairs because she would miss the "news and the gossip downstairs".

It was the claimant's evidence that she advised the respondent that she had a vaginal infection/pre-cancerous cells. It was the respondent's evidence that around mid August 2005 the claimant told him that she had cancer and had six months to live, that she had to go to the UK to undergo tests and she got the all clear. The claimant had also told AU that she had been for tests in England and had got the "all clear" and that that she did not have cancer. AU was shocked because she had not known anything about the claimant's cancer scare.

On Friday, 26 August 2005 the claimant became unwell in the office and later she haemorrhaged in the toilet. The respondent told AU to take her to a doctor or home. On 27 August 2005 the respondent wrote a letter to the claimant, in which he stated,

*“ Having due consideration to your serious health issues that you have advised. I am of the opinion that you are unfit for work at the present. In the interest of your health and welfare, I advise you to take time out until you have fully recovered”.*

In this letter he also provided the contact details for the company doctor and informed the claimant that the consultation would be free of charge. The respondent had gone to the claimant's home on the morning and again later on 27 August 2005 to deliver the letter and when she was not there he left the letter in her letterbox. He had written the letter because he was concerned about the claimant's health.

On 30 August 2005 the claimant's doctor certified her fit to work. She gave her doctor's letter to the respondent but the respondent told her he would not allow her back to work unless she attended the company doctor. The claimant went to the company doctor who also certified her fit for work. On 31 August 2005 the Union Branch Organiser (UBO) telephoned the respondent and questioned his qualifications to determine the claimant's fitness for work. The respondent informed him that his solicitor would be in contact and hung up. UBO in his evidence to the Tribunal agreed that if an employee complains that she had cancer the employer's duty of care would extend to her welfare.

On 1 September 2005 the claimant attended at the respondent's premises with the letter from the company doctor and as the respondent was not in she waited for him downstairs in the area, which the public use, outside the front counter. It was the claimant's evidence that she tried to give him the letter but she could see that he was not pleased. He said to her, “You are not staying here” and he would not accept the letter. The claimant then phoned her union official (TU) who advised her to give him the letter and tell him that she was serving him with constructive dismissal. The claimant followed the respondent upstairs into his office and did as TU had instructed. The claimant asked TU to speak to the respondent and handed her mobile phone to him but he would not speak to her and he put her mobile phone on his desk. The claimant then asked TU to speak out loud (so he could hear her). The respondent lost his temper, jumped to his feet, “swiped his elbow in her direction” and attempted to hit her. In her evidence to the Tribunal the claimant said that the respondent did not hit her. TU advised her to get out. She proceeded downstairs, got her jacket, and left slamming the door. She had been escorted off the premises. She went to her union. It was TU's evidence that she could hear a lot of noise while on the phone to the claimant on 1 September 2005 and she was afraid for the claimant. The respondent would not speak to her on the mobile.

The evidence by and on behalf of the respondent was that he would not accept the letter proffered by the claimant on 1 September as it was addressed to the claimant. The claimant contacted her union official on her mobile and followed the respondent upstairs. The respondent's son and later AU followed them upstairs. When AU got to the respondent's office the claimant was at one side of desk and the respondent and his son were at the other side, about two to three metres apart, and the claimant was screaming down the phone (mobile) to her union official that the respondent “was hitting her and his son was pulling him off her”. AU told the Tribunal that she was watching the scene in disbelief. The respondent only realised that the envelope presented to him earlier was from the doctor when the claimant was screaming down the phone. He told her he would contact the doctor himself. He wanted the claimant out of the office. She said, “I'm leaving and I will destroy you if it is the last thing I do”. The respondent left the office followed by his

son and then the claimant left, still talking on the mobile. The respondent did not dismiss the claimant. According to AU the claimant was “frantic” and “very high”. According to the respondent’s son “she was shouting and very agitated”. She was not escorted off the premises. The claimant had never indicated to AU that she had a problem with the respondent.

On Thursday, 1 September 2005, TU wrote and faxed a letter to the respondent outlining the events of 27 August 2005 to 1 September 2005, his refusal to allow the claimant to return to work despite the fact that she had provided two letters of fitness, suggesting that the claimant return to work with no loss of pay and asking the respondent to contact her as soon as possible “to advise us of your position”. On Monday 5 September 2005 TU again wrote to the respondent stating that it was clear that the claimant had been dismissed and informing him that the matter had been referred to the Employment Appeals Tribunal. In the event, the claimant signed the claim form, initiating an unfair dismissal claim, on 6 September 2005.

Around mid-January 2006, four months after the termination of her employment, the claimant reported to the gardai that the respondent had sexual intercourse with her against her wishes on a date in late September 2004 and again twelve days later in October 2004; the gardai called it “rape”. She did not lodge a complaint at the time of the alleged rape as her husband was dying. She did not make the complaint for a number of months after the termination of her employment, as it was “an awful ordeal to go to the gardai and explain what happened”. She attended the rape crisis centre for counselling. She contacted the revenue commissioners on 6 September 2005 regarding her P45. She also contacted the respondent’s professional body. The claimant told the Tribunal the respondent made two other similar attempts. In cross-examination the claimant said she continued to work for the respondent for around eleven months after the alleged rapes because “He would have to look at her every day for what he had done”. She denied telling the respondent that she had cancer.

The gardai contacted the respondent about the claimant’s complaint in January/February 2006. He fully co-operated with their investigation. He had been detained in a cell for six hours but had never been charged with any offence. This devastated him and he spent a week in hospital and a further ten days in bed at home after his discharge from hospital. He denied that the alleged rapes took place. At the time he was Vice President of his professional body and was due to take on the role of President. The claimant decided to leave. He did not have a problem with her coming back at the time but things have moved on since then. He told the Tribunal that he did not dismiss the claimant.

### **Determination:**

Although the alleged rapes are alleged to have taken place in September 2004 and October 2004 no complaint was made to the gardai until January 2006. There was no evidence before the Tribunal that the claimant had made any such allegations either to the respondent or to anyone else during her employment with the respondent. The Tribunal finds that the events leading to the dismissal were those that occurred between June 2005 and in particular those that occurred between 26 August 2005 and the termination of the claimant’s employment with the respondent a few days later. Furthermore, the incident on 1 September 2005 revolved around the claimant’s insistence that she be allowed to return to work.

Following the claimant’s complaints about her health and the incident in the office on 26 August 2005 it was reasonable for the respondent to be concerned about the state of her health and to request that she see the company doctor. Whilst the respondent did make two attempts to meet the claimant on 27 August 2005, before he left the letter in her letterbox that day, it would have been

better practice to discuss the matter with the claimant first.

The Tribunal accepts that the respondent did not accept the envelope when the claimant proffered it to him downstairs on Thursday, 1 September 2005 for the reason stated. An unpleasant and tense situation then developed between the parties during which the claimant was argumentative and aggressive. The Tribunal accepts that it was only at some stage during this exchange that the respondent realised that the letter was from the company doctor. The Tribunal unanimously finds that the respondent did not dismiss the claimant during that exchange. Nor did the claimant resign at this time as is clear from TU's letter sent later that day. TU notified the respondent on Monday, 5 September 2005, that the claimant had been dismissed and was claiming unfair dismissal. The Tribunal finds that the claimant resigned her position on Monday 5 September 2005. In doing so, without allowing time for calm discussion of the issues as to her health in a calm atmosphere, the claimant acted unreasonably. Having considered the relevant evidence the Tribunal finds that the claimant failed to discharge the onus placed on her by the Act. Accordingly, her claim under the Unfair Dismissals Act 1977 to 2001 fails. As the claimant resigned her position her claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, fails. The claim under the Organisation Of Working Time Act, 1997, succeeds and the Tribunal awards the claimant the sum of €750.00 under the Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)