

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD357/2005

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. P. Casey
Mr D. McEvoy

heard this claim at Cork on 13th June 2006 and 6th December 2006

Representation:

Claimant:

Mr. Paudie O'Mahony, Babington Clarke & Mooney, Solicitors,
48 South Mall, Cork

Respondent:

Mr. Seamus Roche B.L. instructed by Mr. Kieran Griffin,
Griffin Long & Co, Solicitors, 1st Floor Village Chambers, Ballincollig, Co. Cork

The determination of the Tribunal was as follows:

The Tribunal heard dismissal was not in dispute.

Background:

The company is involved in the building industry. The claimant was employed in the office of the company.

Respondent's Case:

Ms. C told the Tribunal she is a director of the company and she was involved in employing the claimant. She wrote to the claimant offering her a position and outlining terms and conditions. Ms. C worked in a supervisory capacity in the office. The claimant's duties included paying creditors, bank reconciliation statements, handling leases for rental properties occasionally, post duties and general office administration. When the claimant first commenced work with the respondent she

worked five days a week from 9am to 1pm. The company facilitated her request later in her employment to work three days a week from 9am to 1pm. At the beginning the claimant was never late for work but this changed. Ms. C spoke to the claimant occasionally about this but the claimant's time keeping did not improve.

During August 2004 Ms. C went on maternity leave. She returned to work on 04 January 2005. During the time she was on maternity leave the Managing Director (hereafter referred to as MD), kept her informed of matters in the business.

On 23 December 2004 the claimant left the office early but she did not tell Ms. C. Ms. C had attempted to phone the office at 12.30pm but the phone was diverted to the claimant's mobile. Ms. C was not aware the phone was diverted at the time. MD told Ms. C the claimant was not at the office. Ms. C phoned the claimant who was in Carrigaline. Ms. C had been in the office for a period of time at approximately 10.00am-10.30am that day and the claimant had not mentioned she was leaving work early.

The claimant's relationship with the company had been good for a number of years. In October 2004 MD helped the claimant and her husband with a project they were undertaking. The claimant stopped speaking to Ms C's husband. By 16 December 2004 there was no communication between MD and the claimant.

A letter dated 01 February 2005 was opened to the Tribunal. Prior to writing the letter Ms. C had addressed issues in two conversations with the claimant in early January 2005. Ms. C discovered the postal log had not been maintained. Ms. C provided details to the Tribunal of dates when the postal log was not completed. An entry was completed on 13 September 2004. The next entry was 05 January 2005 and was entered by Ms. C. The claimant maintained that Ms. C had told her to discontinue keeping the postal log. Ms. C stated this was totally untrue. The claimant's response when Ms. C spoke to her about the postal log was "go away and do it yourself." Ms. C spoke to the claimant about a number of issues on 04 and 05 January 2005.

The claimant's husband phoned Ms. C on 31 January 2005 to tell her the claimant was sick and a medical certificate would follow. When Ms. C received the medical certificate it stated the claimant was suffering from stress. Ms. C was unaware the claimant suffered with stress.

Ms. C wrote the letter of 01 February 2005 as a first written warning to the claimant outlining the incidents leading to the warning.

Ms. C was asked by MD to ask the claimant to book a transport company. The claimant did not do this when asked.

On 17 December 2004 cheques were placed in incorrect payslips. MD noticed this error. If the error had not been noticed it could lead to serious embarrassment.

Ms. C stated in her letter that the claimant's start time for work is 9am but that she was consistently late for work.

The claimant only notified the company on the evening of 21 December 2004 she would not be in work on 22 December 2004.

The letter addressed an incident where a supplier had been paid twice for the same invoice. The

supplier brought this to the company's attention. The company accountant was going to have to complete a full audit of payments to ensure it had only happened once. This would cost the company time and money.

The claimant had not posted important documentation.

Ms. C's letter finished with "I am sorry to inform you that this is to be taken as your first written warning. If we find it necessary to give you a second written warning we will be forced to terminate your employment."

By the time Ms. C wrote the letter of 01 February 2005 she felt the claimant was unhappy with the company and would do anything to upset things. There was a total breakdown in communication.

The claimant's response to Ms. C's letter (dated 08 February 2005) was opened to the Tribunal. In this letter the claimant replied she had left work early on 23 December 2004. The office phone was diverted to her mobile for anyone who needed to contact the office and she had docked herself for the time. Ms. C was not aware the claimant had docked her wages until she received the letter.

The claimant replied if she arrived late to work she always worked past her finishing time to make up for it and that she was very upset an issue was being made about it now. Ms. C told the Tribunal she had addressed the claimant twice about time keeping. At the start the claimant apologised once or twice for being late but then it became a daily occurrence.

The claimant wrote that she had made several attempts to contact Ms. C regarding her absence on 22 December 2004. When she did get in contact with Ms. C she told Ms. C she would come into the office to do what was needed on 22 December 2004 but would need to leave early or take a day's leave and Ms. C decided the claimant was to take a day's leave. Ms. C told the Tribunal at this stage the claimant's attitude was that she did not care about work with the company anymore.

Ms. C said when she was in the office she kept the postal log diligently. She did not tell the claimant that it was only necessary to log post that was deemed to be important.

The bookkeeping reverts to a manual process for three months while the accountant is completing the accounts. The claimant wrote that she had brought a number of difficulties with this system to Ms. C's attention. The claimant alleged she had noticed the overpayment to the supplier and would have corrected it in due course. Ms. C told the Tribunal that the claimant had not notified the company of the error. The supplier concerned brought it to their attention. Ms. C did not accept the claimant's explanation that a difficulty with the manual system had caused the error. Ms. C believed the error was caused by carelessness on the part of the claimant.

The claimant wrote that she did not have opportunity to post the documentation, as she had taken ill and that it was not actually part of her duties. Ms. C told the Tribunal the documentation belonged to one of the company's sub-contractors who is a member of MD's family and the company always posted the documentation. Ms. C believed the claimant did not post the documents because she had a problem with MD and so she also had a problem with members of his family.

During the claimant's absence Ms. C cleaned up the office. The company had changed address during the year and the claimant had been asked to send out letters notifying the bank, Revenue and suppliers of the change of address. The business had moved in July 2004 but these letters were still in the claimant's desk. When Ms. C discovered this she wrote a subsequent letter (dated 08

February 2005) to the claimant regarding the concealment of the letters and that Ms. C had been misled by the claimant into believing the letters had been posted. Ms. C told the Tribunal all trust was gone and there was a total breakdown of communication. This letter dismissed the claimant as the company had “..no other option but to terminate your (the claimant’s) employment with immediate effect. Ms. C felt at this stage the claimant had no interest in the company and wanted to see things go wrong for the company.

The claimant replied to Ms. C’s second letter with letter dated 11 February 2005 stating that she had informed the bank and Revenue of the change of address and the post had been re-directed. She stated she had informed Ms. C the letters to the creditors would have to wait as she had more important work issues. Ms. C told the Tribunal that the company’s post was still going astray. Ms. C said being busy was not justification for the letters not being posted.

Ms. C has involvement with a number of rental properties. The majority of the tenants set up direct debits but some pay their rent in the office of the company. A list of furniture has to be typed for the properties and inserted onto the lease that was saved on the computer. This only takes a few minutes to complete.

Ms. C met with the claimant after her dismissal and gave all monies due.

In cross-examination it was put to Ms. C the document the claimant received concerning her job functions did not mention duties concerning rental properties. Ms. C acknowledged this but said she had mentioned the rental properties to the claimant. There was never an issue about the claimant doing receipts and leases. That was all the claimant did. If it was an issue for the claimant she did not mention it to Ms. C.

Ms. C did not know if the claimant worked past her finishing time to make up for being late.

It was put to Ms. C the claimant was not given a warning on 04 January 2005 as she and the claimant were not communicating at that time. Ms. C replied that there was communication between them. It was put to Ms. C that she had told the claimant on 05 January 2005 that her work was a disgrace. Ms. C told the Tribunal she had told the claimant her work had been a disgrace while Ms. C was on maternity leave. She told the claimant to take this as a warning.

Ms. C told the Tribunal of an incident involving the claimant and a tenant of one of the rental properties. Ms. C had never had a problem with a tenant before. Ms. C asked the claimant to write down from start to finish what had happened with the tenant. The claimant would not do this.

Ms. C was not responsible for bonuses so she did not know if the claimant had received her bonus in December 2004. The claimant could take holidays whenever she wished, that was never an issue.

In January 2005 the claimant started to take her tea breaks in her car. There was a breakdown in communication. A number of issues led to the claimant’s employment being terminated. The claimant had no interest in work and would have done anything to disrupt the smooth running of the company.

It was put to Ms. C that her letter of the 08 February 2005 crossed with the claimant’s letter of the same date therefore disallowing the claimant the opportunity of redress before her employment was terminated. Ms. C said she was not aware the claimant was sending her a letter.

Ms. C was unaware the claimant had the office phone diverted to her mobile outside of office hours. It was put to Ms. C the claimant handled paperwork belonging to greyhounds owned by Ms. C and MD. Ms. C said it was only updating a spreadsheet with details of the dogs' races.

Answering questions from the Tribunal Ms. C was asked if she accepted the claimant was under pressure in work which may have stemmed from the staff in the office being reduced when Ms. C went on maternity leave. Ms. C stated she had all of her work up to date and had made sure everything was done.

The Tribunal heard evidence from the MD who told the Tribunal that the claimant did general office duties and there was no problem with her work initially. About six to nine months after she commenced her employment he became aware of difficulties with her time keeping in that she was coming in late. Initially she worked three days per week and this then changed to five half days. Witness was seldom in the office but Ms C would say to her that she was "late again" and the claimant would sulk creating a bad atmosphere in the office. In or around February 2004 the claimant was building an extension on her house and she requested witness to assist in the design. When the planning permission was granted she then asked him to take on the job of actually building the extension. The respondent was not equipped to do this type of work and he declined her request and suggested that the claimant seek a quotation from the quantity surveyor. Having sent the plans to the quantity surveyor he then received a price for the job and passed it on to the claimant on a Friday afternoon in or around October 2004. The following Monday he met the claimant at work and she was very upset about the price that had been quoted and he assured her this could be discussed. From then on he felt that their relationship deteriorated. Notes were being left on the desk and when he'd ask her anything she would start whistling. When Ms C went on maternity leave witness was in the office on a more regular basis and while he noticed that the claimant was coming in late he did not say anything to her. In November and December when he picked up payslips for workers on site he noticed that some were getting their colleagues payslips.

On 23 December 2004 the respondent was in the process of buying land in the Macroom area and it was important to have the matter finalised before Christmas. When he got in to the office about 12 o'clock that day the claimant was not there even though she had been present earlier. The claimant told him she was in Carrigaline as she had nothing to do. He felt this did not make any sense as the claimant was supposed to be suffering from stress and how could this be the case if as she said she had nothing to do. On that day they were closing for the Christmas holidays and it looked very bad with sub-contractors coming in and no one in the office. Witness said that the claimant was never under any stress at work and he felt that she put pressure on herself in relation to the house extension. He wanted the office to run smoothly and there was never a problem with the claimant using the office telephone. During her employment with the respondent she won a number of prizes through a phone-in on a local radio station and no issue was made even though she used the respondent's telephone for this purpose. Witness has been thirty years in business and during that time he never fired any member of staff.

In cross-examination witness said he was not aware that the claimant stayed late and made up for the times she was late

Claimant's case:

In relation to the 23 December 2004 the claimant said there was an incident with a tenant of Ms C's. The tenant was willing to leave the premises if a new tenant was found. While Ms C was looking for the new tenant she asked the claimant to locate someone to clean out the apartment. The claimant told Ms C when the tenant gave the go ahead to clean the apartment and the claimant subsequently received a telephone call from Ms C that the tenant had an issue and he was going to take up the matter with the claimant. It transpired that Ms C had put his belongings in black bags and it was with Ms C that the tenant had a problem and not with the claimant. As a result Ms C got a call from Threshold and she requested the claimant to put in writing what had happened with the tenant however the claimant did not think it was the right thing for her to do and Ms C hung up the telephone on her. The MD came in collected payslips and left. Ms C rang later and did not wish the claimant a Happy Christmas but said she would see her on the 4 January. Prior to 23 December Ms C would ring the claimant at home and as far as the claimant knew there was no communication problem.

They returned to work on 4 January 2005 and the claimant did not receive a Christmas bonus while other staff did receive one. When the claimant arrived at work Ms C ignored her. The claimant greeted her in the car park but Ms C ignored her. They sat at their respective desks and Ms C continued to ignore her all day. The claimant did not receive a verbal warning that day. The following day 5 January the claimant was also ignored when she arrived at work. Ms C then began shouting at the claimant saying that her work was a disgrace and had been so for the last six weeks and she then said it had been a disgrace for six months. When the claimant asked what was the nature of the problems Ms C listed mistakes in relation to property work. The claimant had been doing this work for so long and had been helping Ms C in relation to the computer. The claimant admitted that she makes mistakes as they both did. A lot of the errors that were thrown at the claimant she felt were not major. She then started to list problems with the MD. For the remainder of that week Ms C continued to ignore the claimant. On the following Monday Ms C came in and just said hello and there was no other communication during the day except when she was leaving she asked to have the phone diverted. This continued for the remainder of the month of January and the atmosphere was terrible. The claimant had a high volume of work to get done and she got through it all by the end of January. On visiting her doctor on 31 January 2005 she discovered she was pregnant and she was certified unfit to work for at least a week as she was suffering from stress. She then received her first written warning dated 1 February 2005 wherein it listed allegations of serious breaches of the terms of her employment. It also stated that if she received a second such warning that her employment would be terminated. The claimant responded in writing to these allegations on 8 February 2005. On 7 February 2005 her doctor certified her unfit to work for a further week. Her employment was terminated by letter dated 8 February 2005.

The claimant said that during her employment with the respondent she had been asked to take on extra work for which she received no additional pay. In relation to the rental properties she had set up a spreadsheet where previously these records were kept manually. There were no complaints in regarding this aspect of her work. Regarding her house extension she asked the MD for a breakdown of the figure however he was not open to discussing the matter. She was not aware of a breakdown in communication between herself and the MD. She subsequently got the work done by direct labour at a much lower price. Ms C invited the claimant to the Christening of her baby and suggested that it could also be a Christmas get-together. The claimant was never made aware that her timekeeping was a serious issue. She always made up the time and if work had to be done she did it. There was a heavier workload at the end of year and with the move to the new office in July 2004. Some of this extra work related to property rentals and associated work. While Ms C was on maternity leave from August 2004 the claimant also took on extra work and she diverted her phone to enable her to take calls in the evenings during that six month period. During that time also the

MD was finalising a site in Middleton and the claimant was involved in the process surrounding the renting of those properties.

On 22 December 2004 Ms C telephoned the claimant requesting her do some work in relation to a tenant who was moving out of a property on Christmas Eve. It took the claimant some time to get the account sorted regarding that tenant and she had her immediate work done. It was three days before Christmas and having her work done for the day she closed the office early. There was no notice of anyone coming in to the office that day however she had the telephone diverted and went to her child's school play. At 1pm she received a telephone call from Ms C saying "how dare" she close the office and the claimant apologised saying it would not happen again. Had the claimant known other work needed to be done that day in relation to some of the properties she would have returned to the office. The MD came in on the 23 December and did not give any indication to the claimant that there was a problem. It was not possible to pay an invoice twice with the accounts package being used however when the manual system was in operation a double payment could be made. She gave an example of paying one supplier twice however this was noticed by the claimant on her last day working with the respondent and she had intended to rectify the matter the following day. She did not conceal letters as alleged by the respondent.

The claimant gave evidence regarding her efforts to obtain alternative employment and said that her baby was born on 23 September 2005.

In cross-examination the claimant disagreed that she did not co-operate with the respondent following on from her request regarding the house extension. Regarding her telephone calls during working hours to a local radio station and her success in winning competitions she said that Ms C encouraged her to make the calls. She had been under pressure for a few months and in January 2005 the stress manifested itself.

In answer to questions from Tribunal members the claimant said that she did not have a contract of employment.

Ms C was re-called to give evidence regarding the tenant who was moving from the respondent's premises. Threshold rang witness and as a result she rang the claimant asking her to make out a list as she wanted to know the sequence of events. The claimant refused to make out the list and sign it. Her relationship with the claimant was soured and it was all work related.

Determination:

The Tribunal is unanimous that the claimant was unfairly dismissed. The respondent failed to adhere to proper procedures and terminated her employment while she was on sick leave. The claimant in evidence indicated that she was in receipt of Disability Benefit during her sick leave period up to September 2006 and accordingly the Tribunal is not in a position to compensate for this period of time. As the Tribunal has agreed that the claimant was unfairly dismissed it is making an award of €996 this being the equivalent to 4 weeks remuneration which the Tribunal has discretion to award under Section 7 of the Unfair Dismissals Act, 1977 to 2001 as amended by

Section 6 (a)(c)(ii) of the Unfair Dismissals (Amendment) Act, 1993.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

