

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD731/2006

against

MN484/2006

2 Employers

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr J. Hennessy  
Ms. E. Brezina

heard this claim at Kilkenny on 16th May 2007

Representation:

Claimant(s): Mr. David M. Dunne, David M. Dunne & Co., Solicitors,  
31 Rose Inn Street, Kilkenny

Respondent(s): O'Dowd, Solicitors, Bridge Street, Boyle, Co. Roscommon

The determination of the Tribunal was as follows:-

This was a claim for constructive dismissal.

### **Claimant's Case**

The claimant told the Tribunal she commenced employment as a part time receptionist with the respondent, a cosmetic surgeon, in early June 2005. She was to become full-time if it went well. She answered the telephone, booked people in and got the patients' files. Everything was fine until Christmas and she enjoyed her job. In January, Dr S commented to her that the business had not been doing as well as it had prior to her joining. Dr. S told her that there were three choices: he could close the place or she and her colleague (JC) would have to turn the place around or he would replace both of them. She discussed this with JC and both were of the opinion that they could be in trouble. They joined a trade union around late January 2006.

On 3 February 2006 the trade union official (TU) wrote to Dr. S but did not receive a response. Two weeks later on 21 February Dr. S called JC, who had already received a written warning, to a meeting. The claimant was present at that meeting with JC. Dr. S dismissed JC at the meeting. TU should have been at the meeting. Dr. S told the claimant if she wanted to hand in her notice he

would gladly accept it. After lunch a client telephoned enquiring about a procedure. Dr S was standing nearby listening so the claimant was intimidated and could not answer the client. He grabbed the telephone from her and answered the customer's questions and then handed the telephone back to her to make an appointment for the client. When she had finished with the client Dr. S reprimanded her for not having the information, which the client wanted. TU had suggested to her earlier that day to leave if anything happened. Dr. S had never raised his voice to her before this. She was confused and upset so she left. She telephoned JC and they both spoke to TU who tried to arrange a meeting with Dr. S to find out what was going on. Dr. S denied to TU on that telephone conversation that he had raised his voice to the claimant. Dr. S could not meet with TU and nothing was ever done about it. She had not received full training. Dr S told her to choose a few items from the respondent's brochure and he would go through it with her on Tuesdays but this never happened.

There was no change in the business since JC and the claimant started. JC and the claimant made efforts to promote the respondent's business: they distributed brochures and leaflets to the various businesses and considered advertising but Dr. S said that was too costly. She went to the credit union and they had an advertising facility on the internet. TU advised her not to return to work on 21 February. She was not in a good condition so she obtained a sick note. She received her P45 two to three weeks later.

In cross-examination the claimant agreed that Dr. S had spoken to her about some performance issues either before Christmas or before she joined the trade union but added that these were not serious issues. Dr. S had confronted JC and herself about not answering the telephone but they told him there was a problem with the telephone and this was repaired. Neither JC nor herself were present in the office when the telephone technician came to repair the telephone as they had gone to the Citizens Information Centre for information; they had directed calls to the company mobile phone but JC had the mobile on silent while they were in the Citizens Information Office. She agreed that this was not a fair performance of her duties. She could not recall being in the office when the photographer called to do a promotional shoot but was aware he had called. Dr. S had also taken the telephone from her on another occasion to answer a client's query. He had spoken to her about his dissatisfaction regarding discounts and vouchers, about her late starts and leaving work early and about the charging and collection of fees but added that she had only been late on a few occasions and she remained on late to make up the time lost; only regular clients were given discounts and she did not write many vouchers. She agreed that the information she gave to clients was insufficient. The brochures, provided by the respondent, only gave a basic idea about the cosmetic procedures. When Dr. S spoke to her she tried to improve. She could not recall having a review around Christmas 2005. She performed her duties as best she could and had only left the office unattended on a few occasions.

The only threat she received to her job after she had joined the trade union was when she questioned JC's notice/dismissal and Dr. S yelled at her and told her that if she wanted to hand in her notice he would gladly accept it. This was the only time Dr. S had raised his voice to her and it was after she had joined a union. She denied shouting or raising her voice to or insulting Dr. S. She agreed that Dr. S was prepared to meet with TU but that he (TU) had a prior engagement.

She knew that Dr. S had three clinics and appreciated that her leaving work on 21 February could cause a difficulty for the patients but she could not return to work. She had a doctor's certificate to say she was suffering from stress; the doctor had not put her on any medication for stress. She was aware that the manager had to travel from Dublin to contact patients and that he had no keys to the clinic. JC had the keys to the clinic. The claimant admitted that she also had a set of keys. The

claimant received a Christmas present from Dr. S as well as a card, which referred to her as "Australia Rose". In his Christmas card to JC he referred to her having a "heart of gold". She agreed that she had a good working relationship with Dr. S. She obtained a good reference from the manager. The respondent did not have a disciplinary process in place.

JC told the Tribunal that she had worked as a therapist for the respondent in his clinic on Wednesdays, Thursdays and Fridays. The situation was fine until Christmas 2005 but then the clinic was quite and Dr. S directed his frustrations at the claimant and herself. He told them it was up to them to turn the business around but this was not in their job descriptions. Matters deteriorated in January 2006 when she sought payment for bank holidays. Dr. S thought she was not entitled to such payment. After she joined the trade union things spiralled out of control. Anything that JC and the claimant did was never good enough. There was no mention of how they tried to turn the business around. Dr. S directed it all towards the claimant. However, she did not witness this but the claimant told her about it.

JC received a written warning and MG tore it up because he did not agree with its contents. JC was told that she had two weeks in which to turn the business around. Both the claimant and JC believed that if business did not increase their employment would be terminated. The claimant and JC both joined the union in late January/early February 2006. TU indicated that he would write to Dr S and they would endeavour to resolve matters that needed to be addressed. Both the claimant and JC were present when the photographer arrived. They both tried to obtain a space to advertise the business. She confirmed that there had been a problem with the telephone connection. They went to the Citizens Information Centre for advice because they were afraid that they were going to lose their jobs.

She did everything that was requested of her but she was informed that her employment was being terminated. She went home after she was dismissed and shortly after this the claimant telephoned her to tell her she had walked out.

In cross-examination JC agreed that, on a few occasions, Dr. S had spoken to them about problems prior to Christmas 2005 but added that these were only some "teething problems". Dr. S told her to have a witness at the meeting on 21 February 2006. He agreed to have the claimant present but ignored her request to have a union representative present. She was aware that Dr. S agreed to meet TU at 19.00 that evening but that TU was unavailable. Dr. S did not make any reference to her joining a union. Dr. S. did not shout at JC or the claimant during the meeting. She was not present when he shouted at the claimant. Dr. S wanted to get rid of them.

TU (the trade union representative) told the Tribunal that both the claimant and JC contacted him in mid January 2006 because they were concerned about the three options mentioned by Dr. S and whether they could be let go if they didn't turn the business around. At his invitation they joined the trade union. He wrote an introductory letter to Dr. S on 3 February 2005 but did not receive a response. The claimant later told him that there had been a change in the atmosphere at work and she felt that it was because they had joined the trade union. He told them that this could not happen. The claimant was protecting JC who had received a written warning and the claimant felt that she would "be next".

On 21 February 2006 he received a telephone call from JC informing him that she had been summoned to a disciplinary meeting. He told JC that he would prefer to be at the meeting. He advised her that he or a witness should be present with her at the meeting that morning. At lunch-time he was informed that JC was dismissed. The claimant, who had intervened at the meeting on

behalf of JC was very upset by Dr. S's remark to her (the claimant) that if she was unhappy she could leave and was concerned that she was not wanted at work. The claimant was returning to work after lunch and he advised her if it was too much for her to take time off and go home. He met the claimant in the afternoon and she was very emotional and distressed. He had never seen anyone so distressed. He could not advise her to go back to work but told her to go to the doctor.

He contacted Dr. S hoping to resolve the situation. Dr. S was upset that the claimant had walked out and told him that the claimant had dismissed herself from his employment. Dr. S was not available for a meeting until 19.00 that evening but TU had to go to Carlow that evening. Dr. S was prepared to meet him in Carlow at 19.00. Dr. S wanted to put his side of the story. TU suggested a meeting the following Tuesday or whenever. Dr. S told him to arrange a meeting through his secretary. They arranged a meeting for mid-June but TU had to cancel it due to a serious dispute in Kilkenny. Dr. S told him the next opportunity for a meeting would be September. TU felt this was too late and referred the matter to the Rights Commissioner. TU had not been aware that the respondent had problems with the claimant and JC.

### **Respondent's Case**

Dr. S, the respondent told the Tribunal that he was a cosmetic surgeon and has clinics in Dublin, Kilkenny and Limerick. He operated out of Dublin and he specialises in breast implants. The claimant's predecessor in the Kilkenny clinic had been with him for fourteen months but resigned due to health problems. The claimant commenced employment in June 2005 on a part-time basis. Business has improved and he now has two full-time employees in the Kilkenny clinic.

The claimant was a nice and pleasant girl with potential. She was the first line of contact with the public. She progressed well initially but then he had a number of problems with her: the telephone, which is vital in his business, was not being answered and clients had to contact the office in Dublin to make an appointment; clients were given incorrect prices and information; she was not very punctual; she was issuing discounts and vouchers which she had been told she was not authorised to do; she failed to follow-up on fees due and absented herself from work during office hours: the office was unattended when the telephone-repair man arrived and many of his telephone calls to the clinic were not answered. He agreed that there had been a fault in the telephone connection but calls were not answered after it had been repaired. The only issues he had with the claimant were related to her performance of her duties. He had no issue with her joining the union. He spoke informally to her about these issues several Tuesdays or as they arose. He confirmed that he gave a present to both the claimant and JC at Christmas; these were from him personally and not from the business. Her performance was not up to standard before Christmas and she did not improve after Christmas. He did not have a disciplinary procedure in place at that stage. He employed a manager in late 2005. The manager was responsible for staff issues and he introduced a disciplinary procedure.

In February Dr. S called JC to a meeting to issue her with four-weeks' notice. Whilst JC asked to have her union representative present he told her they could meet the union official later; he wanted to issue her with her notice that day. The claimant was present at the meeting at JC's request. The claimant was upset and very defensive at the meeting. He had to ask her to calm down and lower her voice. The claimant told him that he could not do this (issue notice to JC). Later that afternoon there was another outburst from the claimant: she told him he had no conscience and that he could not do that to JC who was a wonderful worker. He told the claimant that it was not her issue and that if she was unhappy with how he managed his business she could leave. The claimant walked out and four days later she faxed in a medical certificate. Dr. S was left with a list of patients to see

that day but he managed to get through it. He had to cancel other appointments.

TU telephoned him that afternoon. The claimant and JC were with him. Dr. S offered to meet him after work at 19.00 or later that evening and when that did not suit TU, who had to go to Carlow that evening, Dr. S offered to meet him in Carlow but TU was unable to meet him then either. He gave TU the telephone number of his secretary in Dublin to arrange a meeting. A meeting was subsequently arranged for 16 June 2006 but TU failed to show up or send an apology. Having waited about twenty minutes on that occasion, Dr. S made telephone contact with TU's office and when TU returned his call he told Dr. S that he was going home because he was sick and had just come to the office to make a call. Dr. S suggested that they meet in September and he never heard from him since. Dr. S was quite clear that he had told TU that the claimant had walked out; he had not said, "she dismissed herself." He did not dismiss the claimant.

In cross-examination he made it clear to the claimant that he was the only person that issued vouchers. Prior to 2006 the claimant was absent from work on two or three days. He never raised any issue with the claimant about joining the union. He did not grab the telephone from the claimant; she was giving incorrect information to a client over the telephone and he asked the claimant to hand over the telephone to him; she had given a quotation of €5,000 for a lip enhancement but this procedure was only €400.00 or €1,200 if it was to have permanent effect. He told the claimant what she should do but he told her not to go into the technical details. He did not dismiss the claimant. Dr. S was very unhappy with the situation. He did not shout at the claimant; it was not in his nature to shout at people. His nursing staff are members of a trade union.

He had brochures detailing the various procedures/operations he performed. The prices for these were on a separate list but the girls had filled in the prices on the brochures for their convenience. He was sceptical about TU's decision to send the claimant to the doctor for a medical certificate.

Mr. AR on behalf of the respondent told the Tribunal he was manager of the organisation. Whilst he had torn up the original letter of warning to JC he issued a corrected version of the warning letter to her two days later.

### **Determination**

The claimant left her employment on 21 February 2006 on grounds that she felt intimidated and harassed by Dr. S. for joining a trade union. The Tribunal is of the unanimous view that the claimant failed to establish that she had been subjected to such behaviour by the respondent since she had joined the trade union in or around late January 2006. Accordingly the claim for constructive dismissal under the Unfair Dismissals Acts, 1977 to 2001 fails. As the claimant resigned from her employment she is not entitled to compensation under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

