

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

2 Employees

CASE NO.

UD183/2006
MN102/2006
WT57/2006
UD184/2006

MN103/2006

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: Mr L. Ó Catháin
Members: Mr. M. Forde
Mr J. McDonnell

heard this claim at Cork on 16th May 2007
and 9th July 2007
and 10th July 2007

Representation:

Claimant: Timothy Lucey & Company, Solicitors, North Square,
Macroom, Co. Cork

Respondent: Mr. John Barry, Management Support Services (Ireland)
Limited, The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:

Background:

The fact of dismissal is in dispute in these cases.

The Respondent produces beauty products. The Claimants worked as factory workers.

The Claimants contend that they were constructively dismissed from her employment as factory workers for the Respondent in Ballymakeera in Co. Cork. The Claimants are sisters. The first named Claimant commenced working for the Respondent as a general operative in June of 1999

when she finished school.

The First named Claimant's supervisor was given notice her employment was redundant on 9th September 2005, when she took her holidays. She was on holidays herself at the time and she returned on 14th September 2005. On 19th September she and some other workers went to ask the director why the supervisor was being let-go. He refused to discuss the matter with them. They then asked him if they could also be let-go and he told them 'If needs be'. He called her back to his office later that morning and accused her of having relationship difficulties in work and she denied these. She received a letter of warning the following day. She wrote to him on 21st September asking him to specify the allegations. There was some further correspondence.

In the meantime her sister, the second named Claimant, who also worked for the Respondent, received a letter notifying her of a medical appointment for 8th November. On 7th November her sister asked a Mr. L who worked in the accounts department in the Respondent, if she could take the following day off and if her sister could also take time off to drive her to the hospital. Mr. L agreed. Her sister checked again with Mr. L if it was ok and he agreed again.

When the first Claimant arrived back to work on 9th November she received a letter from a Ms X, from the Dublin office, to say she had been absent from work on 8th November, without permission. She spoke to Mr. L to ask him to clarify the matter with Ms X. At a later time she received a letter stating that she had not replied and that alleged she was observed in the local village whilst being absent because of illness. She felt completely intimidated and upset by the letters. She had tried to explain and the Respondent did not listen. She was so distressed that she wrote a letter of resignation, which would have been received by the Respondent on 28th November 2005. The Respondent sent her a letter stating that she had to leave by 29th November 2005.

The second named Claimant commenced working for the Respondent at the end of August 1999. She had an appointment for the hospital for 8th November 2005 and asked Mr. L on 7th November if she and her sister could have the day off and he agreed. When she arrived back to work she received a letter the same as her sister had. The situation was the same as her sisters. Both she and her sister knew that they had no future in the company and both sent letters of resignation.

The Respondent contends that the Claimants submitted their resignation voluntarily and were not coerced by the company to do so. No dismissal notice was ever issued by the company and therefore there is no valid claim by the Claimants.

First named claimant's case:

The Tribunal heard evidence from the Claimant. She told the Tribunal that it was her first job after leaving school in 1999.

She explained that her sister was getting married in September 2005 so she and her sister (who also worked with the respondent at the time) took a week off for the wedding. She arrived back to work on 14th September. Her original supervisor was due back to work on 19th September but she did not return. The Claimant asked the manufacturing manager about the situation if she was going to do the supervisory work. The manufacturing manager asked the Claimant and circa six or seven of their colleagues if they would go to speak to the director, and they agreed.

They met with him, as they were concerned about their jobs. The meeting was on 19th September. He was reluctant to talk with them.

The Claimant met the director in his office at a later time. He told her that she was having “a few problems”. She told him that she was not and the only problem is the way that the original supervisor was treated. He then told her that she was harassing another worker. The Claimant told him, “we will clean it up in the office”, [to ask the other worker to the office]. The director would not allow this and she returned to the factory floor. The Claimant returned home after finishing work and she was “shocked”. She phoned the Equality Authority for advice.

The Claimant returned to work the next day and she was called to the director’s office. A colleague accompanied her and the owner gave her a handwritten letter. This letter dated 20th September 2005 was opened to the Tribunal:

“I warned you yesterday not to continue with the harassment of staff. In spite of this warning you continued to engage in the harassment of staff. We hereby warn you that if you continue to harass, bully or intimidate employees in any way in the future it may lead to your dismissal from the company”.

The Claimant told the owner that she had asked the Equality Authority for advice and that she was due an apology from him because of what he had said. The Claimant told the Tribunal that from that moment she knew she did not have a future in the company.

She wrote a letter to the owner/company dated 21st September:

“Re: Harassment Accusation:

Mr. (the director).

I (the Claimant) have sought legal advice in relation to the harassment / bullying accusation brought against me and I have a right to defend myself.

I have a right to know the following:

1. Who I allegedly harassed
2. When I allegedly harassed him/her?
3. How I allegedly harassed him/her?
4. How many times I allegedly harassed him/her?
5. Why and by whom was my personal life discussed in the workplace?

I have a legal right to receive the above information in writing and signed /dated by the complainant”.

The owner replied by letter dated 17th October 2005:

“We refer to your letter of 21/09/05. We note that you have sought legal advice but it is not clear if you actually received any such advice. However, in any event, you might like to let me know what legal statutes you are relying on to support your alleged rights to enable me to consider comprehensively your requests”.

The Claimant told the Tribunal that she did not get a reply to her requests.

The Claimant’s sister was due to attend for a medical procedure on 8th November 2005. Her doctor had told her that he would obtain a cancellation for her. On the Friday before the 8th November her sister received a letter to say that there was a vacancy.

They went into work on Monday 7th November and asked Mr. L, who worked in the accounts department (for time off the following day). They would normally ask the original supervisor but she was no longer there. They were never told who to go to since. Her sister asked Mr L if she could take the time off and if she could be accompanied by the Claimant to drive her. She thought

that they had permission to take the day off.

The day after they took the day off she received a letter. Letter dated 9th November 2005 was opened to the Tribunal:

“We note that you were absent from work on the 8th November without permission. Please let us have your reasons for and circumstances of this absence without permission so that we can fully investigate”.

The Claimant told the Tribunal that she was under the impression that they had received permission from Mr. L and that they were never absent without permission. In the meanwhile she wrote a letter in reply to the directors letter of 17th October. Letter of 15th November opened to the Tribunal:

“I refer to your letter of 17/10/05 and I wish to inform you that I received advice from “the Equality Authority””. I hope this will enable you to comprehensively fulfil my requests”.

Other correspondence opened to the Tribunal:

Letter from respondent to the claimant dated 23rd November 2005:

“We wrote to you recently and we have not received a reply. We enclose copy of the letter for your information.[letter of 9th November].

Furthermore you informed the company on Tuesday 22nd November that you were going home as you were not feeling well. Yet you were well enough a short time later to be providing transport down the village and yet did not return to work. We also note that you did not request if you could have the time off and that there is a continuing absence from work today.

These are very serious disciplinary matters to which we require a reply urgently”.

Another letter from respondent to the claimant dated 23rd November 2005:

“We wrote to you recently and we have not received a reply. We enclose copy of the letter for your information. [Letter of 9th November]. This is a very serious disciplinary matter to which we require a reply urgently.”

Letter from claimant (and on behalf of her sister) dated 28th November 2005:

“In response to your letter dated 23rd November 2005 we wish to inform you that we sought and received permission from the quality assurance manager on Monday the 7th November to be absent from work on Tuesday the 8th November. We informed him that (claimant’s sister) had an appointment for eye surgery at Cork University Hospital and that she would require a driver, after receiving your first letters we asked the quality assurance manager on two separate occasions to clear up the miss understanding (*sic*) with you.

Furthermore there were doctors certificate handed in by (the claimant) on Wednesday morning the 9th of November stating that (the claimant’s sister) would be absent from work for the remainder of the week and also stating clearly the reasons for and circumstances of the absent in question.”

Letter from the claimant dated 25th November 2005:

“I (the claimant) wish to inform you of my resignation. I am giving a weeks notice commencing on Monday the 28th of November and finishing on Friday the 2nd of December 2005. I would appreciate it of you to have my P.45, my holidays to date and my week in hand in order for Friday the 2nd”.

Letter from respondent dated 29th November 2005:

“We are in receipt of your letter of resignation posted on 25th November, 2005. As you have sufficient unused holidays you will cease physical work for the Company at 5.00 p.m. today. Your wages for last week will be transferred to your bank a/c on Friday 2nd December. Your wages for this week, together with any outstanding holiday pay will be transferred to your bank a/c on Friday 9th December. Your p45 will also be posted to you on Friday 9th December. You will be aware that there are two disciplinary request on your file to which we have not received replies”.

The claimant explained that her letter of explanation of 28th November crossed with letters from the respondent.

The claimant received a reply to her letter of explanation by letter undated:

“We refer to your letter allegedly written on 28th November but posted after you received our letters of 29th November.

We are just amazed at the reference to Mr. L in your letter and the grossly unfair pressure you have obviously been putting on him to confirm something that he would never have been authorised to do, a fact the both of you would clearly have understood, evidenced by the fact that you had never previously, over many years sought such approval from him.

In addition we do not see the relevance to us of requiring a driver. We would expect that (your sister) would get her husband to do any driving required. In any event there is no reason whatsoever that the driver should be one of our employees who was scheduled and required for duty at her work place on that day”.

The claimant explained that that was the last letter. She explained that they were never told that they had a supervisor after the original supervisor finished working there. The quality assurance manager informed them of their holiday entitlements and they often went to him. For an example she would mention to the quality assurance manager about time she took off and he would tell her that he would deduct it from her wages.

The claimant told the Tribunal that towards the end of the employment two people timed them on the machines and this had not happened before. She also told the Tribunal that it was never explained to her what they meant by harassment.

Second named claimant’s case:

The Tribunal heard evidence from the second Claimant. She was six years with the company and was married in September 2005. She was not present at the first meeting with the director and arrived back to the factory after that meeting. She was not long back from her honeymoon and her husband was self employed therefore she asked the quality assurance manager for time off to go to the medical appointment for her eyes and that she needed her sister to bring her. He told her “yes I will sort that out”. She asked him if he would phone head office in Dublin for her and he told her he would. She did not ask the manufacturing manager because she always asked the quality assurance manager for her holidays. Later on that day she saw Mr. L and checked with him again and he agreed.

She had the procedure on Tuesday 8th November. On Thursday or Friday she received the same letter as her sister: Letter dated 9th November 2005:

“We note that you were absent from work on the 8th November without permission. Please let us have your reasons for and circumstances of this absence without permission so that we can fully investigate”.

She asked her sister had she handed in her medical certificate for her and she told her that she had. She told her sister that she would remedy the matter with Mr. L. She went to Mr. L on the following Monday.

The witness told the Tribunal that Mr. L was as surprised as she was and she asked him to phone Dublin to sort out the matter.

She then received the letter of 23rd November 2005:

“We wrote to you recently and we have not received a reply. We enclose copy of the letter for your information. [Letter of 9th November]. This is a very serious disciplinary matter to which we require a reply urgently.”

She went to the quality assurance manager and told him that she received two letters and she asked him if he wouldn't mind explaining again to the office. He told her that he would. He told her that he was talking to the director about it and the director said that her husband should have brought her. The quality assurance manager told her that the director told him that they all have to work and why did not her husband bring her.

The witness told the Tribunal that she was “worried about it, I was newly married, I needed the job”. She then explained, “I decided to leave, we decided to leave”.

The witness then explained about the letters that crossed. And explained that the company did not ask her about the letter of explanation that her sister typed.

In cross-examination it was put to the witness that Mr. L did not give her permission to take leave and he had not the authority to do so. She replied that she asked him twice. The witness explained when questioned, “because I couldn't take it anymore, so on edge, you would be afraid, they would be timing you”. It was put to the witness that the director timed the machines always. She did not go to anyone to say that she was upset and was resigning.

The Tribunal heard evidence from a colleague of the claimants. She explained that the original supervisor was due to return to work in order to work her notice period. The first Claimant asked another the manufacturing manager if she was doing the original supervisors job and she replied that she did not know. They went to the director and he asked if there was a problem. They asked him where the original supervisor was and he seemed agitated. The following day there was another meeting. She accompanied the first named claimant to the meeting. The director handed the Claimant a letter of warning. He told the Claimant to read the letter carefully. She asked him if she could ask the manufacturing manager to come in to clarify the situation and he agreed. The Claimant went to the manufacturing manager who was in her office. A couple of minutes later the director jumped from his chair. She saw the Claimant coming out of the office.

The witness was asked if she heard shouting and she replied, “I was as near (the Claimant) as the director was and there was no shouting”.

Respondent's case:

The Tribunal heard evidence from the manufacturing manager. She explained that a decision was

made to make the original supervisor redundant. The operations manageress advised her that she was being offered a job. The job offered was not the same job that the original supervisor had done it was a bigger job. The original supervisors job did comprise part of her new role. She had previously “covered” the original supervisors job when she was on holidays.

On 19th September it was part of her role to allocate work to the Claimants and the other workers. They asked her if she was doing the original supervisors job she told them that the original supervisor was on holiday. The first Claimant (her sister had not returned) spoke to her in a raised tone of voice and told her that the original supervisor was not on holiday. They asked if they could speak to operations manageress and she said that the director was there.

At a later time the Claimant arrived into her office. The Claimant said to her “tell him you are not doing the original supervisors job”. She told the Claimant to calm down then the director arrived and they left.

Another worker told her three times in a raised voice to “tell him that you are not doing the original supervisors job”. She went to her office and waited a few minutes and then went to speak to the director.

At a later time the Claimant stormed into her office and put her hands on the desk and leaned over the desk. The Claimant said, “Go now go now and tell him”. She told the Claimant to please stop shouting at her. The director then arrived into the office. The Claimant knew that he had arrived and the director and the Claimant left.

She spoke to the second named Claimant who said that she was not speaking to her and to just leave it at that and that her sister would do what she would do (chose to do).

If the staff needed time off they would come to her. She allocated the daily tasks. She did not observe bullying or intimidation. She did not have disagreements with staff and work relations were the same as before 21st September. Regarding the timing of the machines the director always timed the machines; it did not commence in 2006.

Regarding the absences the quality assurance manager was responsible for the wages; he was not involved in giving people time off or allowing them to leave early.

Regarding the assertions of the Claimants about tension the witness was not aware of any tensions in September and the Claimant did not comment about tensions.

The witness was asked about the incident about the first named Claimant going home, she explained that she was in the office and the Claimant arrived in and told her that she had a headache and was going home. The Claimant did not ask her she told her. Later on the witness was having lunch with her sister and she saw the Claimant driving her mother in her car.

The Tribunal heard evidence from the quality assurance manager. He was present when the two claimant’s gave their evidence and he referred to the named claimant stating that she asked for timeoff. He does not give permission for time off and does not have the authority to do so. The procedure for requesting time off would be to consult with the manufacturing manager, operationsmanager or the director. He recalled the second named claimant saying she was going to Cork foran eye operation and she would not be in the following day. Witness regarded this as informationrather than a request. He did not recall the second named claimant asking was it okay

to take the next day. The second named claimant said she had received a letter from the director stating that she had not received permission for the time off. He said he was talking to the director, who is his superior the previous day. He had only the one conversation regarding this matter. He did not contact headquarters.

In cross-examination witness said he is over the night shift and staff would have said it to him regarding time off and he would have passed it on to the director, or to the manufacturing manager. If they asked him he did not know if they thought he was giving them permission. He knew the second named claimant had problems with her eyes. Staff asked him if they could take time out of their holidays and he would ask the director. He did not recall the second named claimant asking him for time off. Witness assumed she had gone to the director and got the permission herself.

In answer to questions from Tribunal members witness said that nobody ever required time off from witness. He did not tell the claimant to go to the manufacturing manager but he assumed she would have done so.

As far as he knew he was told that the manufacturing manager had taken over.

The Tribunal also heard evidence from an employee who had been working with the respondent for six years. She was aware that the original supervisor had been made redundant as she had been in contact with the first named claimant and told her. On 19th September, 2005 She was not aware of any problems with the original supervisor. The manufacturing manager was supervising all the floor at that time. She was approached by E a colleague of the two claimant's and instructed to go to meeting in reception. E was angry. The director was in the hallway and he told witness to go to reception which she did. There were ten at the meeting and E was doing the talking, in a raised voice. The first named claimant and another colleague had spoke but witness did not get involved. She left and went back to her work. E subsequently came to her asking why she did not stand up for them at the meeting.

In cross-examination witness said that the manufacturing manager was doing the original supervisors job while the original supervisor was on holidays. Witness works on the factory floor and while she knew that the manufacturing manager had taken over she and her colleagues were not told. At the meeting certain staff members were giving out that the original supervisor had been made redundant and the director just said her job was being made redundant.

After 19th September no one else was appointed as supervisor on the floor. If you wanted time off you went to the manufacturing manager.

The Tribunal also heard evidence from the operations manager who has worked with the respondent for eighteen years. Her working week is divided between Cork and Dublin. While she was not in Cork on 19th September she was there other days that week and the following week and she had been made aware of what happened by the director. The atmosphere was fine and no grievances were reported to her. She would not liaise on a one-to-one basis. The manufacturing manager incorporated the original supervisors duties with her own and she reports to witness and to the director. The manufacturing manager never indicated there was an issue with staff and staff never came to witness asking who is in charge. The manufacturing manager delegated the work to the staff. She issued the letter on 9th November to the first named claimant. Witness was out of the country on holidays at the time and the director had been in touch with her. Witness drafted the letter and her office manager issued it under her instructions.

The two claimant's had taken the day off and had not sought the permission of the manufacturing manager. She returned from holidays on 14th November and as there was no response to her letter she issued a follow-up letter on 23rd November. A similar letter was also sent to both claimants. The manufacturing manager had also reported to witness that on Tuesday 22nd November the first named claimant said she had a headache and walked off the job. She was out of work also on 23rd and she reported back to work on 24th. On the Thursday the claimant's mother phoned witness who told her she could not discuss any employees business with her. Her mother said she was sick of the way her daughter was being treated. On 1st December witness received a response to her letter of 9th November.

On 29th November letters of resignation were received from both claimants. Witness responded by letter of the same date asking both claimant's to cease work that day as they had unused holidays. Once an employee had submitted his or her resignation it is company policy to say okay to leave. She was never made aware that both claimants' were harassed at work. She has had cause to write to other employees regarding disciplinary matters but she never had to write to the claimant's in this regard. The director checks that the machines are performing and it is the machines that determine the speed and not the people. If employees were unwell the normal practice would be to have a cup of tea but the last resort would be to go home with a headache.

In answer to questions from Tribunal members as to why the staff were not told officially that the manufacturing manager had taken over she said that the respondent would not generally make those kind of announcements but she was happy that they knew. When asked if it occurred to witness that it was heavy handed of the respondent to refer to disciplinary matters in letter of 29th November when the issue was the two claimant's being absent for a day. Witness responded that there are a small number of staff and pressure to get orders out. Reference was also made to its not seeming to be human as the two claimants did ask for the day off from the person who appeared to be in authority and the response from witness was that it undermined the manufacturing manager by not asking her for permission.

The Tribunal also heard evidence from the director who is the controlling shareholder and also acts in a number of other roles in the company including that of director. The respondent has an office in Dublin and the manufacturing is in Cork. He is based in Cork two to three days per week as on a need basis. There are twenty five staff with eighteen on the production side which could vary depending on the contracts. They try to avoid laying off staff. They make miniature cosmetics for the first class flights and to a small extent hotels. They make the cosmetics, put the soap into cartons and they make the bottles and cartons in addition to their decorating them also. The first class business kits tend to be made in China and 90% of what they make ends up in China with a five week shipping time. It a very difficult economic situation where there is a minimum wage but there is no means of control in this area in China and other countries. The respondent pays the national minimum wage.

The original supervisor was made redundant and it was hoping to combine a number of functions. The number of functions were brought down from eight to six and while they wanted to look after the original they also wanted to bring down the management overheads. There would have been a vacancy at operative level and they would have maintained the pay but she took the redundancy.

On 19th September 2005 he received a call from the manufacturing manager to say the staff wanted to meet him. He went to the manufacturing manager's office and found a gathering on the corridor. E asked why was the original supervisor not there. It appeared that E was the one asking the questions and she was being bossy towards a member of staff in forcing her to join in the meeting.

The first named claimant being the last to join the meeting was very stressed out and also asked why was the original supervisor not there. E was in a more determined mode. The first named claimant went on to say that the original supervisor was supposed to be back to work out her notice.

Witness said he could not give details about the original supervisor's redundancy. The first named claimant questioned as to whether they could all be made redundant and witness responded that it depended on the orders. The meeting went on for about twenty minutes and they were demanding that the original supervisor be re-instated. The manufacturing manager approached witness later that morning saying that the first named claimant was demanding to know if she was doing the original supervisors job. This was having a negative effect on the manufacturing manager and he asked her if she would arrange to have the first named claimant meet him. The first named claimant came in accompanied by E. The first named claimant was stressed and implied that witness said she was harassing the manufacturing manger. Witness never mentioned the word harassment. Witness then went to the factory office and heard the first named claimant saying words to the effect --- "tell him you're not going to do her job". He assumed she was talking to the manufacturing manager. The first named claimant's tone was quite firm, her voice was raised but she was not shouting. Witness heard this being repeated three times. He said to the first named claimant to get back to work and to stop harassing the manufacturing manager. This was the first time he used the word harassing.

Witness would normally be in the office around 9am and the manufacturing manger would be there from 7.30am setting up the machines. The manufacturing manager told him that the first named claimant was continuing to demand that she was not to do the job (ie the original supervisors job). He then took the opportunity to draft up letter in the event the first named claimant would deny what had occurred and she denied as anticipated. He gave her the hand written letter dated 20th September 2005 and told her she should read it carefully. After the receipt of the letter the manufacturing manager did not report anything to him. On 24th September he received a letter from the first named claimant referring to who she "allegedly harassed" and was surprised to see she had sought legal advice. He received the same letter from the second named claimant. Further correspondent passed between the parties dated 17th October and 15th November and this was opened to the Tribunal. On 8th November the two claimants did not turn up for work and the respondent was surprised as usually they or their mother would ring. On 9th November the first named claimant came back to work and brought a medical certificate for her sister stating that she had had an eye operation. While he was aware she had eye problems he did not realise she was having an operation. The first named claimant said that her sister had asked permission from the quality assurance manager. When he spoke to the quality assurance manager he said that he did not give permission but that the two claimants did mention it and that the first named claimant would have to drive her sister. Witness was concerned there was some form of insubordination. He referred to the letters dated 9th November which were sent to both claimants. During that time six others were on leave and they all asked the manufacturing manager for permission. The manufacturing manager had started doing this job on 8th September and this was 8th November which was two months later.

He also referred to incident on 22nd November when the first named claimant went home with a headache and he discovered that later that day she was seen driving the car with her mother. Other correspondence was referred to and opened to the Tribunal. Both claimants tendered their resignations by letter dated 25th November 2005. Both claimants were doing unique jobs with the first named claimant mixing and the second named claimant soap making. If they wanted time off it would have been courteous to discuss with their supervisor who at this time was the manufacturing manager. He understood that both claimants were excluding the manufacturing manger from their social contact.

In cross-examination when asked if he was the boss witness said that he and the operations manager run the business between them. At the time they did not have grievance procedures in writing. They operated on a system of custom and practice. The staff were not told about the original supervisor leaving and the manufacturing manager taking over but they understood.

In answer to questions from Tribunal members as to whether the new manufacturing manager made the job different which may warrant two staff members resigning, witness said the he had not heard any complaints about her. As to there being a lack of communication on the part of management with the original supervisor leaving and the manufacturing manager taking over witness said it was not their style and they felt that the important thing was continuity. The manufacturing manager had been doing the job for the previous eight days and there were no problems.

Determination:

The Tribunal is unanimous that the claimants did not reach the standard of proof to claim constructive dismissal. The Tribunal noted that the respondent did not appear to have any formal grievance procedure in place. Had there been proper procedures this situation might not have arisen. The claims under the Unfair Dismissals Acts, 1977 to 2001 are therefore dismissed in respect of both claimants.

Since this was a case for constructive dismissal the claims under the Minimum Notice and Terms of Employment Acts 1973 to 2001 also fail in respect of both claimants.

In respect of the first named claimant no award is being made under the Organisation of Working Time Act 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)