

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1236/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. P. Pierson
Mr. J. LeCumbre

heard this claim at Tullamore on 26 September 2007
and 24 January 2008

Representation:

Claimant:

Mr. Fintan Hurley B.L. instructed by
Ms. Anne Marie Kelleher, Byrne & O'Sullivan Solicitors,
Windsor Lodge, Edenderry, Co. Offaly

Respondent:

Mr. Gerard Groarke B.L. instructed by
Mr. Brian O'Meara, O'Meara & Co. Solicitors
55 JKL Street, Edenderry, Co. Offaly

The determination of the Tribunal was as follows:

This was a case where the claimant was alleging constructive dismissal. In those circumstances it falls to the claimant to prove her case.

The respondent, a company involved in the supply and installation of information technology hardware and software, as well as installation work, for small network operators, employed the claimant from 1994, initially as a secretary/receptionist. The claimant had worked for a previous company owned by the managing director (MD) of the respondent but was recruited from a retail outlet in a service industry. The claimant was talented in the operation of computer equipment and assumed an important role in the assembly and repair of computer

hardware. She was also involved in the fielding of service calls received by the respondent. MD held the claimant in a position of trust to the extent that she dealt with the payroll and had some responsibility for the running of the respondent's bank accounts. There was no contract of employment, job description, terms and conditions, disciplinary or grievance procedure. For the last four years of the employment the claimant worked three days a week on Tuesday, Wednesday and Thursday. From November 2004 she had a second job two days a week. This had initially been on Friday and Saturday but towards the end of the employment she began working for the second employer on Monday instead of Friday.

The respondent's position is that for the last six or nine months of the employment MD became less happy with the claimant's performance. He felt that she spent too much of her time answering service calls that the receptionist (TR), who only worked mornings at the time, could handle and that she gave priority to the repair of local customers who dropped in with work over repair jobs for major customers. He had asked the claimant to provide a weekly update of the cash flow situation but the claimant had only produced this twice in the six months of the employment. It was further the respondent's position that the claimant had provided customer support to a client whose account had been suspended for non-payment. The claimant's position was that she answered the telephone only when TR was either busy or not at work, she kept MD well up to speed on the cash flow situation.

During the previous week MD asked the claimant to work on Monday 22 May 2006 as TR was on leave and, whereas phone calls to the respondent normally diverted to MD's mobile phone when the office was unmanned, MD knew that on this day he would be in an area where there is limited coverage. The respondent's position is that MD was surprised that the claimant could not work Monday 22 May 2006; he had not known that she was now working Mondays for her second employer. The claimant's position is that MD was annoyed with her and gave her the "silent" treatment over the next three days. On Tuesday 23 May 2006 the claimant took a phone call from a major client and handled a query from this client. The respondent's position is that MD had instructed the claimant and TR that all calls from this client were to be put through to MD. It is common case that soon after MD had to deal with a complaint from this customer arising from the claimant not being aware of some aspects of the customer's requirements. At the conclusion of his phone conversation with the customer MD instructed the claimant and TR that the claimant was not to answer phone calls under any circumstances when TR was present.

On Thursday 25 May 2006 the claimant became aware that there were insufficient funds in the bank account to meet the payroll requirements. The respondent's position is that MD has no recollection of being told this. The claimant's position is that she telephoned MD to remind him to lodge a particular cheque. The claimant was not in the office on the morning of 25 May 2006. She phoned TR that afternoon to ask TR to phone her on next morning when MD arrived at work so that she could process the payroll. The respondent's position, disputed by the claimant, is that this was the first and only occasion when there had been insufficient funds to meet the payroll. MD arranged for funds to be made available and then phoned the claimant to enquire what she was owed, he then took the amount in cash to the claimant's home. TR received a cheque the following week.

On the claimant's next day at work, on Tuesday 30 May 2006, the claimant was asked by MD to come for a chat in private about her behaviour. The respondent's position is that before he could begin to talk to the claimant she began to shout and stormed out after a minute or two. The claimant's position is that MD told her she was too big for her boots and would have to do as she was told. She accepts raising her voice to MD and storming out. The claimant submitted her

resignation the following day.

Determination:

After careful consideration of the conflicting evidence the Tribunal has come to a majority decision in this case with Mr. LeCumbre dissenting. The majority finds that the instruction MD gave on Tuesday 23 May 2006 that the claimant should not answer the telephone was a legitimate instruction for MD to give as the owner of the business. Regardless of whether or not Thursday 25 May 2006 was the first occasion on which there had been insufficient funds to meet the payroll, the majority is satisfied that, whilst the claimant telephoned MD on that day, she did not tell him that there were insufficient funds. Given the claimant's responsibility for the running of the respondent's bank accounts and the difficulties over the claimant's answering of the telephone the majority finds that it was reasonable for MD to want to talk to the claimant on Tuesday 30 May 2006 about her conduct. Whilst there was a clear conflict of evidence as to who was the more aggressive during the course of this meeting, TR's evidence supported the respondent. In those circumstances the majority is satisfied that MD's behaviour on 30 May 2006 and the preceding days was not such as would leave the claimant with no option but to resign. Accordingly, by the afore mentioned majority, the claim under the Unfair Dismissals Acts, 1977 to 2001 must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)