

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD992/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B.L.

Members: Mr. J. O'Neill
Mr. S. O'Donnell

heard this claim at Dublin on 14 to 17 January 2008

Representation:

Claimant:

XXXX

Respondent:

Ms. Rhona Murphy, Solicitor, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

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

The respondent is a provider of a comprehensive range of facilities and services for people with learning disabilities. The claimant, a highly regarded member of staff who had been employed for in excess of 25 years in a variety of positions, was appointed to a position as manager of one of the respondent's workshops (the workshop) from 13 September 2004. There are over fifty workers in the workshop with a staff of six reporting to the manager. The respondent was in a process of change at this time whereby the emphasis was changing from a sheltered workshop carrying out a variety of contract work to a quality system where personal outcome measures were used. This change in emphasis meant that a lot of time was spent working on individual plans for the workers. The workshop is co-located with the marketing department, which consists of a manager (MM) and a senior supervisor (MS). In the months before the claimant was appointed MM had also been acting manager of the workshop.

The relationship between the claimant and the marketing staff was such that, following an incident involving a senior workshop supervisor (AS) and MS which took place in front of a customer, the claimant wrote to MM on 3 November 2004 insisting that MS not come onto the workshop floor and that all instructions to the workshop from marketing come through MM. On 5 November 2004 a meeting attended by the claimant, MM and the service manager (SM), their direct line manager, was held to discuss marketing involvement with the workshop. Whilst there is no agreed set of notes of this meeting, the claimant wrote to SM on 11 November 2004 with her version at which time she had not received SM's version, it is common case that marketing were to liaise with the workshop through the claimant and were not to direct staff in the workshop. The incident involving AS and MS is not mentioned in either set of notes. It is the claimant's position that she was requested, but refused, to agree to MM's presence at the 5 November 2004 meeting not being indicated on the notes of that meeting because of concerns about the way MS would react.

The claimant's position is that whilst the 5 November 2004 meeting clarified issues it did not resolve them and the relationship between the workshop and marketing was problematic on an ongoing basis. The respondent's position is that nothing further on these lines was documented for some ten months. Whilst there was no probationary period in the claimant's contract of employment the claimant produced a three-month review of the workshop. Her position is that this review was prepared in December 2004. It is common case that the report was not given to SM until around September 2005.

In mid July 2005 the regional director (RD) was faced with a managerial staffing difficulty due to a combination of sick leave and annual leave. As a result he asked SM to get the claimant to move to another workshop for a three-week period. SM conveyed this request to the claimant in a phone call on the afternoon of 14 July 2005. The claimant's position is that she was told she was to become acting manager of the other workshop for an indefinite period; she was to assume responsibility for the other workshop from 18 July 2005. The claimant wrote a letter of complaint about this move to RD on 14 July 2005 and delivered it to RD's office on the morning of 15 July 2005. In this letter the claimant proposed that a better plan would be for MM to become acting manager for the other workshop and sought a meeting with RD to discuss the matter. RD phoned the claimant as she was on her way home on 15 July. Whilst there is a dispute about the tenor of this conversation, RD does accept using unfortunate language in regard to his authority. The claimant did assume responsibility for the other workshop for the period requested.

During the morning of 20 September 2005 a temporary supervisor (TS) and a clinical psychologist (CP) were discussing a confidential situation in relation to a worker when MS, who wanted to discuss one of the workshop's contracts, approached them. It is the claimant's position that MS made disparaging remarks about TS, a continuation of an ongoing pattern of behaviour towards TS. The claimant met TS for a review meeting later that day and sensed that TS was unhappy about something. It was then that TS told her about the incident with MS that morning. On 22 September 2005 the claimant sent a memo to MM, with a copy to SM, in regard to the incident of 20 September 2005. The memo concluded by asking that MS be made aware that such behaviour was "unwelcome, offensive and must not be repeated". On 14 October 2005 SM contacted the claimant to tell her that AS, who had been working in another part of the organisation, had expressed a wish to return to working at the workshop. In order to accommodate AS in this way it would be necessary for TS to move to another part of the organisation. This was put to TS who, like the claimant, was concerned that this move for TS was in reaction to the incident of 20 September 2005. TS moved from the workshop some seven weeks later.

On 26 October 2005 the claimant met with SM to discuss both the incident of 20 September 2005 and her memo to MM and SM about the incident. At this meeting SM told the claimant that she should have discussed her concerns with him before putting things in writing. SM told the claimant that CP had no recollection of the incident of 20 September 2005. SM told the claimant she had left both herself and the respondent open to being sued by MS. The claimant was instructed to set up a meeting between herself, MM and CP to attempt to resolve the matter. She was also asked to send SM a copy of his complaint. It is the claimant's position that SM described MS as being "in a very powerful position".

On 27 October 2005 MM sent a memo to the claimant, with a copy to SM. This memo put the position that on 22 September 2005, following her memo of that day, the claimant had told MM that it was CP who had complained, not TS. The memo of 27 October 2005 sought a meeting of CP, the claimant and MM to discuss CP's complaint and TS's assertion that MS often questioned his work in a disparaging and belittling manner. The claimant sent a memo in reply to MM, with a copy to SM, the same day. In this reply the claimant pointed out that she had never suggested that CP had complained. She sought that MM deal directly with her in contract dealings and that MS only deal with the claimant and not with any staff members. She referred to the agreement of November 2004 to confirm that marketing had no role in monitoring the performance of workshop staff. TS put his complaint about the events of 20 September 2005 in writing on 2 November 2005.

In preparation for a meeting he was to have with the claimant on 4 November 2005 SM consulted both RD and the human resource manager (HR) with responsibility for his area of the respondent. SM did not want his management team to operate by the sending of memos. HR suggested to SM that the claimant could be in breach of disciplinary procedures by ignoring his advice about curtailing the use of memos. HR also suggested to SM that he get the claimant to withdraw the 22 September memo and to apologise to MS, as there was no evidence to substantiate that the incident happened. At his meeting with the claimant on 4 November 2005 SM raised these matters with her. He further advised her that she had not taken a common sense approach to the incident and had escalated a matter that could have been dealt with locally. SM said to the claimant that "in future she was not to put anything in writing without first discussing them with him as her service manager". SM asked the claimant to withdraw her memo of 22 September 2005. The respondent's position is that the claimant replied that she would first need to get legal advice before doing so.

The claimant wrote to the CEO of the respondent on 6 November 2005 to say that she found herself in an impossible situation in her position as manager of the workshop. She referred to the 20 September 2005 incident pointing out that this was the second occasion since her appointment where she had to write to MM to complain about MS. She set out her view of the difficulties she was having over six pages. She complained of being undermined by marketing and being without support from both SM and RD. She stated that, if the issues she had raised could not be resolved quickly, she felt she had no option but to resign, as she would not put her health at stake for the sake of a job. CEO received this letter on the morning of 7 November 2005. Before CEO had made SM aware of the letter SM called at the workshop to speak to TS, in the absence at Head Office, on an unrelated matter, of the claimant. SM discussed both TS impending move from the workshop and the situation regarding the 20 September 2005 incident. On her return to the workshop the claimant took the view that SM had attempted to intimidate TS. She sent a memo that day to CEO alleging same.

CEO replied to the claimant on 8 November 2005, acknowledging both pieces of correspondence from her. This letter went on to say that CEO had asked HR to arrange to meet her to listen to her concerns. HR met the claimant on 15 November 2005 with a view to alleviating stress, listening to

concerns and to work on solutions. The claimant was looking for an investigation by a third party into matters of concern. At the conclusion of this meeting the intention was to organise a second meeting between the two participants but in the event the claimant decided not to meet HR again. On 16 November 2005 RD replaced SM as the claimant's line manager with another service manager (AM).

On 12 December 2005 CEO wrote to the claimant to confirm that he had appointed the deputy CEO (DC) to chair a formal investigation into the claimant's complaints. The major part of this process was the appointment of an external investigator (EI), a recently retired CEO of a non-Dublin organisation involved in similar work to that of the respondent, to establish the facts and conclude their investigation. EI met the claimant, initially in the presence of DC, on 14 December 2005. Over the next four weeks he met HR, SM, TS, RD, MM & MS and produced a report dated 13 January 2006. EI found that the allegation of constant interference by marketing in the running of the workshop to be exaggerated. He found that the claimant was reasonable in her perception of lack of support. He found that while some of MS remarks to TS were inappropriate, the actions of the claimant in escalating the matter had also been inappropriate. He found that the directive to the claimant from SM in regard to memos was unreasonable and unwise. Included in EI's recommendations he stated that both the claimant and MS had not treated TS with dignity and respect.

On 6 January 2006, when the claimant was in her office with AM, an incident occurred in the workshop involving threats being made by a worker against a two staff members. The worker had become agitated and the claimant felt that this agitation might have been exacerbated by the actions of MS during a conversation with the worker. The claimant sought to have this incident added to the terms of reference of EI's investigation. This request was not acceded to and the matter was dealt with using established procedures. It was found there were several contributory factors to the worker's behaviour; none of these involved any actions of MS.

A meeting for the claimant to go give feedback on EI's report was held with DC on 24 January 2006. The claimant was deeply unhappy with EI's report to the extent that, on 27 January 2006, she tendered her resignation to CEO to take effect on 30 April 2006. She submitted a seven-page response to DC at the same time in which she stated that she felt the report was deeply flawed and inadequate and punished her for having complained. She dismissed the report as arbitrary, biased and offensive.

Towards the end of February 2006 the claimant was successful in a job application with another employer. After some perceived difficulties over the obtaining of a reference from DC, the claimant last worked for the respondent on 17 March 2006 and after a period of annual leave left the employment on 31 March 2006 to start with her new employer the following week. During her period of notice, and indeed after, the claimant was involved in discussions with DC about the possibility of remaining with the respondent in a different role and later about a further enquiry into her grievances.

Determination:

Under section 1 (Definitions) of the Unfair Dismissals Acts, 1977 to 2001 *"dismissal", in relation to an employee, means— b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would*

have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer.

This is the definition of constructive dismissal under the Acts and the Tribunal's jurisdiction is encapsulated within that definition in respect of a constructive dismissal. In a majority decision, with Mr. O'Neill dissenting, the majority found that arising out of the evidence that the Tribunal heard it was clear that the claimant was appointed manager of the workshop arising out of a competition. It was also clear that the marketing department had a function in the running of the workshop prior to the claimant's appointment and that this function was unofficially devolved on MS. This situation was allowed to continue without rectification following the appointment of the claimant. This appears to have been a serious error on the part of management within the respondent.

The claimant's terms of reference, which she was entitled to rely on as the guide for her authority within the respondent, were in conflict with the de facto situation within the respondent. It should have been clear to the respondent's management that there would be conflict because of this situation. As could be expected, this soon occurred, resulting in a serious altercation between AS and MS. The respondent's management should have taken action at that time in order to ensure that there would be no repetition of this incident. The claimant asserted that there was continuing difficulty and interference generated by the inaction of management to this situation. She further asserted that there were many small incidents over the ensuing months, which reflected the fact of the failure of management to take proper control of the situation and support the claimant in her work. The majority notes that MS was not called to give evidence and therefore the claimant's evidence in this regard is uncontested.

Management did recognise the claimant's value in her role and applauded her for implementing recommendations that would be of benefit to the workers. A further major incident erupted in September 2005, which again involved MS. The claimant attempted to deal with the matter in a rational way but her attempts failed due to a lack of support from management. This lack of support had an alienating effect on the claimant and she wished to progress the matter further. Unfortunately management appears to have failed, neglected or refused to recognise the serious situation that then existed. Management appointed the EI to report on the circumstances of the situation and when this report was issued it contained conclusions detrimental to the claimant, which were not supported by the facts. This had an effect on the claimant which rendered her unable to repose any further trust in the independence and fairness of management decisions in the matter and which culminated in her terminating her employment by giving notice to her employer. In coming to this determination the Tribunal preferred the evidence of the claimant to that of SM or MM. The majority are satisfied that the claimant was justified in the course of action she took. In coming to this decision the Tribunal is cognisant of the strenuous efforts made by the respondent to rectify the damage that had been done by their inactivity and failure to take any measures in response to the situation which they knew or ought to have known existed in the workshop however this was ex post facto and the Tribunal did take it into consideration in coming to its determination

Dissenting opinion:

In Mr. O'Neill's dissenting opinion he found that both SM and the MM said they never received the claimant's letter of complaint about an altercation on 03 November 2004. Both said there was no

mention of an altercation at a meeting held to discuss marketing matters on 5 November 2004. The claimant and SM made separate notes of the meeting, neither of which made reference to an altercation. SM said he received no complaints about marketing from the claimant in the period from her appointment on 13 September 2004 until 22 September 2005. He held monthly meetings with the claimant and issued detailed notes. None of these made reference to complaints about marketing, nor was there any evidence that the claimant sought to correct the notes to include any complaints. Differences between production and marketing departments are commonplace and may have existed in the workshop, but there was no evidence to support the claimant's evidence that she complained about marketing before the incident on 20 September 2005.

In July 2005 RD asked the claimant to assist him in a staffing crisis by managing another centre temporarily. He asked her because of her special competence in implementing a new Individual Planning policy, and because her centre was the only similar one in his region. She suggested that MM should transfer instead of her. RD was candid in acknowledging that he used a metaphor, which he regretted, to describe the response he expected from his managers in times of crisis. RD's request was reasonable and was in accordance with the terms of the claimant's contract of employment.

The claimant said she had made earlier unsuccessful attempts to arrange a meeting with the RD to discuss work difficulties. RD said he had no knowledge of this, and that he had never refused a request to meet any of his managers. There was no persuasive evidence that the claimant had a legitimate grievance against RD.

In the aftermath of the incident on 20 September 2005, there were shortcomings on the part of SM. He failed to confirm to the Tribunal that he had issued a clear instruction, as distinct from advice, to the claimant not to write about complaints without first talking to him. The accusation that she had breached an instruction by responding in writing to MM's letter was questionable therefore. His decision to tell the claimant that she was in breach of disciplinary procedures, without conducting a proper disciplinary investigation, deprived her of rights and protections to which she was entitled in disciplinary situations. His instruction to the claimant to withdraw her complaint, without conducting a proper complaint's investigation, was similarly flawed. However the claimant had contributed to escalating a remark made in a joking manner into a crisis. She was not present during the incident and relied on one party's description of what had occurred. No complaint was made to her and yet she complained in writing without adequate enquiry or investigation. The claimant had grounds for appealing SM's decisions however, and the respondent took reasonable steps to process her appeal.

The claimant should have referred her appeal to RD in the first instance and given him an opportunity to address her complaint, but declined to do so for reasons that were not persuasive. She should have allowed HR to attempt to resolve her complaint. Instead she refused to meet HR after their first meeting, and insisted on a third party investigation. She decided therefore not to use available internal mechanisms for resolving her complaint, and she was not entitled to hold the respondent liable for the consequences of agreeing to her demand for a third party investigation.

The investigation report contained some conclusions that were detrimental to the claimant, and were not seen by her to be related to evidence. She was entitled to question such conclusions. The respondent was extraordinarily comprehensive in addressing the claimant's concern about the investigation report, both before and after her resignation.

The respondent offered the claimant another third party investigation into her complaint, allowed

her to veto their nomination of an investigator, agreed to her nomination of an investigator, and offered a range of options regarding alternative posts, independent external professional support, and time off to consider her position regardless of whether she decided to leave eventually. During the period that her complaint and appeals were being processed she was not required to report to the Service Manager who had been the subject of her concerns. She reported to a different Service Manager instead. She chose nonetheless to resign. She had indicated some months prior to the incident on 20 September 2005 that she planned to leave the respondent, and having identified an attractive and better paid position in another prestigious organisation, she left.

The onus of proof in unfair dismissal cases is on the respondent. In cases of constructive dismissal such as this case the onus is on the claimant. The claimant failed to meet her obligations in this regard and her claim for constructive dismissal must fail therefore.

The Tribunal therefore determines, by the aforesaid majority, that in all the circumstances the claimant was justified in terminating her employment by giving notice to the respondent and as a consequence was constructively dismissed by her employer. Having considered the remedies under the Acts the Tribunal deems that the most appropriate remedy in this case is compensation. As the claimant had no financial loss the Tribunal awards €3,660-00, being four weeks' remuneration, which is the maximum permissible under section 7 (1)(c)(ii) of the Unfair Dismissals Acts, 1977 to 2001 where the claimant has no loss.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)