

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
Employee

CASE NO.  
WT173/2007  
UD549/2007

Against

Employer

under

### ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr J. Browne  
Mr A. Butler

heard this claim at Wexford on 26th June 2008

Representation:

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Claimant(s) :

Mr. Edmund Sweetman instructed by Alison Gillette, Maguire McNeice & Co., Solicitors,  
Bray House, 2 Main Street, Bray, Co. Wicklow

Respondent(s) :

Mr. John Kennedy instructed by Doran O'Toole, Doran W O'Toole & Company, Solicitors,  
Unit 3b, Woodland Office Park, Southern Cross, Bray, Co. Wicklow

The determination of the Tribunal was as follows:-

#### **Preliminary Issue**

The claimant's legal representative made an application to change the name of the respondent to XXXXX on his clients T1A form as this was the legal name of the respondent. The Tribunal allowed this application and the hearing proceeded.

#### **Claimant's Case**

The claimant gave direct evidence that she commenced working for the respondent on the 5<sup>th</sup>

August 2005. The business trades as XXXX and is a fitness centre for women. She was employed as a manager in the gym and even though she had no managerial skills she was told by her employer that all necessary training would be provided. For the first six months of her employment she enjoyed a good working relationship with her employer and was based in Gorey, Co. Wexford from September 2005 until her employment ended.

In April 2006 she informed her employer that she was pregnant and immediately noticed a change in her employer's attitude towards her. Her employer asked her to consider her position as maybe she might not be up to the job as she was pregnant. The claimant replied that she would be able to do her work. The claimant had some medical issues during her pregnancy that necessitated medical appointments along with her normal medical appointments. One such appointment coincided with a training course organised by her employer and her employer became aggressive and angry towards her when she discovered this. The claimant changed her medical appointment to ensure she could attend the training course on that occasion. During that training course the claimant felt excluded and felt she was being talked about by her employer.

The claimant went on to give evidence that in May 2006 her employer instructed her to put her working times and dates of her medical appointments on the roster. Prior to her pregnancy she did not have to put her working times on the roster. Her employer had also told her that two staff members had complained to her about the claimant's management style. These two staff members denied that they had made any complaint when asked by the claimant.

The claimant applied for a total of three weeks holidays in July and August 2006 and was refused. Her employer said that she did not deserve the holidays. On the 29<sup>th</sup> or 30<sup>th</sup> June 2006 the claimant had a meeting with her employer and her employer's accountant. The accountant explained that he was meeting with all the managers in the fitness centres and the purpose of the meetings was to discuss ideas about increasing membership numbers. The claimant was told that there were 400 members at the start of 2006 and this number had now decreased to 208 in the gym where she was manager. She was told that she would have to generate new members and was asked as to how many new members she would be able to generate. She was told that if membership did not increase to 500 that her job would be in question. She was shocked when she heard this and felt threatened but does not recall how she replied. She felt very unwell after the meeting and contacted her doctor the following day who advised her to take early maternity leave which she did. While on maternity leave she attempted to contact her employer by telephone on several occasions but was unable to do so. Her employer was never contactable. Any further contact with her employer was done through writing.

The claimant gave further evidence that, in September or October 2005 she visited her husband's fitness club in Arklow along with her husband. She was just accompanying her husband and was not working there. While she was sitting beside a table the respondent entered the premises along with a colleague and stood at the door area. The respondent said "I just wanted to see you working here" and left. She met the respondent on the street on a couple of occasions after this and greeted her. The respondent never acknowledged her greetings.

The claimant confirmed that she is now employed with a nursing home and has been since the 1<sup>st</sup> May 2007 and receives €400 per week gross. She did not receive any holiday pay from the respondent.

Under cross-examination the claimant agreed that she never made any complaint in writing to her employer. She confirmed that she went on sick leave on the 30<sup>th</sup> June 2006 and remained on sick

leave until her maternity leave started at the end of August 2006. She was paid during her sick leave. She was on maternity leave for approximately 5 months and resigned on the 21<sup>st</sup> December 2006.

The claimant's husband gave sworn evidence that he met with the respondent on an occasion in April 2006 when he gave her a medical certificate on behalf of the claimant. The respondent enquired from him as to the claimant's well being and when he replied that she was not very well the respondent suggested to him that it might be better if she left.

The third witness gave evidence that she worked for the respondent at the same time as the claimant. She noticed that the claimant was always brought out to lunches by the respondent but these lunches stopped when the claimant became pregnant. She witnessed arguments between the claimant and the respondent. Under cross-examination the witness confirmed that she had a baby while working for the respondent and returned to work for the respondent after her baby was born.

### **Respondents Case**

The owner of the business gave evidence that she is the owner of a number of fitness centres that trade under name of XXXX. The claimant was employed by her since early August 2005 and became manager of the fitness centre in Gorey, Co. Wexford on the 19<sup>th</sup> September 2005. She had no problem with the claimant's work and was delighted for the claimant when told that she was pregnant and denied that she ever asked the claimant to leave.

Employee numbers had reduced from four to two and accordingly she asked the claimant to include her name on the roster and to put the dates of her medical appointments on the roster. This would allow her to get cover for her shifts when the claimant was absent on medical appointments. It was purely for management reasons that this was introduced. The witness gave evidence that one such medical appointment coincided with an exam that was being undertaken by the claimant and other employees at the end of a training camp organised by XXXX whereby successful candidates are awarded certificates. She asked the claimant to re-arrange her medical appointment to take account of this and understood that the claimant was upset after the conversation. The claimant did re-arrange her appointment, did the exam and was awarded a certificate.

The witness gave evidence she had a meeting with her accountant and the claimant where targets were set and general strategies to help improve the business in the future were discussed. This meeting occurred towards the end of June 2006. She also held similar meetings with the managers of her other fitness centres. At the conclusion of the meeting her accountant sought a report from the claimant to be e-mailed to him the following morning. The claimant contacted her the following morning seeking clarification as to what was to be included in the report. The witness replied that she was unsure as to what was to be included and suggested that the claimant contact her accountant directly. The claimant provided medical certificates to the witness within a few days of that meeting and did not return to work. The witness went on to give evidence that she heard that the claimant was working in a fitness club in Arklow. She visited this club and saw the claimant there. When she saw her she said to her "I wanted to see it with my own two eyes".

Under cross-examination the witness gave evidence that four employees had babies while working for her and none of them were treated badly. All four were offered their jobs back. She denied that she would ever ask any employee to leave because she was pregnant. She denied that she had ever sought written notice of the claimant's medical appointments and refused to accept that she could not be contacted on her mobile phone. She did not demand that the claimant change her medical

appointment but did point out to the claimant that there was no point in attending the training camp if she could not do the exam. The witness acknowledged that the claimant did not receive her full holiday entitlement and said the claimant had fourteen days holidays owing to her.

The second witness for the respondent gave evidence that she is a manager in XXXX in Arklow. She attended a business meeting with the respondent's accountant to help set targets for the business. She was queried and questioned during the meeting and did not feel any undue pressure or stress as a result of that meeting. She confirmed that she had found the meeting beneficial and had received notice of one day of the meeting. Under cross-examination she confirmed that she was never told she would lose her job if targets were not achieved.

The third witness gave evidence that she is manager of XXXX in Wicklow town. She finds her employer is family friendly and is aware of one employee who went on maternity leave and returned to work. She also met with the respondent's accountant and found their meeting very helpful.

The fourth witness gave evidence she is employed in XXXX in Arklow. She has worked there for the last four and a half years and had a baby during that time. She returned to work after her baby was born and found her employer to be very accommodating towards her during her pregnancy.

### **Determination**

The Tribunal having carefully considered the evidence adduced by the claimant and the respondent in this case is satisfied that this is a case which clearly falls within the definition of Constructive Dismissal as defined in s.1 of the 1977 Act which transfers the burden of proof as to dismissal to a claimant. The Tribunal is unanimously of the view that the claimant has not produced sufficient or adequate evidence to discharge the onus of proof required by the tribunal in a claim for Unfair Dismissal. Accordingly the claim under the unfair Dismissal Act fails.

The Tribunal is satisfied that the claimant is entitled to fourteen days holiday pay and awards the claimant the sum of €1346.80 under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

