EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD927/2006
MN708/2008

against
Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

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

Members: Ms. M. Sweeney
Mr. J. McDonnell

heard this claim at Waterford on 1st November 2007 and 15th January 2008 and 16th January 2008

Representation:

Claimant:
Mr. John P.D. Purcell, Purcell Cullen Kennedy, Solicitors,
21 Parnell Street, Waterford

Respondent:
Mr. Pat Gordon, Joseph P Gordon & Company, Solicitors,
Burgery, Dungarvan, Co Waterford

The determination of the Tribunal was as follows:

At the outset of the hearing the claim was amended on consent to allow a claim under the Minimum Notice and Terms Of Employment Acts 1973 to 2001.

The respondent owned a dental practice in a small town. He and his associate (the second dentist) were the two dental surgeons in the practice. The claimant commenced employment with the respondent in June 1996 as a dental assistant. She worked mainly with the second dentist, who began in the practice at around the same time and in latter years she compiled the practice accounts. Another dental assistant (Ms. A) commenced employment in the practice in February 2004. Both assistants worked well together. A third employee Ms. B joined the practice in February 2005, initially on a temporary basis but became permanent when the employee whom she was replacing decided not to return to work. Ms. B had previously worked in retail and had no experience or

working in a dental practice. The claimant and Ms. A were respectively assisting the second dentist and the respondent and Ms. B was learning from both of them; she did whatever they had not time to do, which occasionally included the appointments diary.

The atmosphere between the claimant and the other two assistants became tense. The problem started when the claimant returned from a holiday in May 2005 and was unhappy about the amount of work left for her to do and began to reprimand Ms. B about her paper work. Whilst Ms. B did make some mistakes in her paperwork Ms. A did not have any problems with this as Ms .B was new and was only learning. The claimant was constantly finding fault with everything Ms. B did and never once told her that her work was ok (Ms. A confirmed this in her evidence). Ms. B felt undermined and incompetent. Ms. B did not complain to the respondent because she was new in the job and the claimant had been employed there a lot longer than she. Ms. A eventually became involved, because Ms. B was frequently upset and crying, and she told the claimant "to give Ms. B a break". After this intervention the relationship between the assistants deteriorated and the atmosphere became more hostile. Ms. A spoke to the respondent about the tense atmosphere. He had already noticed it. On foot of advice he had received, the respondent spoke to the three assistants on 23 May 2005. At that meeting the respondent did not single out anyone but told the three assistants that the atmosphere between them was totally unacceptable and asked them to pull together for the good of the practice. Things settled down reasonably well for some time thereafter.Ms. B was upset after this meeting and apologised to the claimant.

In September, on the claimant's return to work, following an absence due to illness, she was again unhappy about the work she had to do and problems arose again between the assistants. From the evidence it is clear that because Ms. B was having problems completing forms she had been instructed to leave them for the claimant to check when she returned to work. It was the claimant's evidence that Ms. B did not have any interest in learning how to do this work. The evidence on behalf of the respondent was that Ms. B was afraid of making mistakes because the claimant constantly corrected her and the majority of the time she did so in front of patients or the dentists(This was confirmed by Ms. A). It was the manner in which the claimant corrected Ms. B that caused her to become upset. The claimant denied ever berating or reprimanding Ms. B. The claimant had instructed Ms. B to cancel appointments she had made for a number of patients while the claimant had been absent and did not give Ms. B any reason for this instruction; this made Ms.B feel that she was being put down. It was the claimant's evidence that the appointments cancelled were those of Social Welfare patients who were not entitled to a second dental cleaning within a six-month period and that she had explained this to Ms. B in a reasonable manner. The claimant complained that telephone calls from patients were not passed on to her. When Ms. B called the claimant to the telephone she would not come out for ages and when she told her that a patient had arrived for an appointment the claimant would come out later and tell the patient that no one told her that s/he had arrived. Ms. B admitted that some telephone calls might have gone astray. Another issue of contention between the assistants was about one of the two uniforms Ms. A purchased for the claimant. According to the claimant it was horrible and bought to give the other two assistants a laugh. According to Ms. A it was all that the shop had at the time and she had told the claimant that it could be changed. There were mutual allegations of being ignored. Whilst the claimant alleged that the other assistants sneered and laughed at her it was Ms. B's evidence that on occasion there was a bit of banter between them (the two assistants) and that one must laugh sometimes but they did not laugh at the claimant.

The claimant had complained to the respondent about Ms. B's filing and booking of appointments and told him that the second dentist did not want her assisting in his work but she had

notcomplained to him about any ill treatment by the other two assistants. The claimant had on occasionmentioned to the second dentist that the assistants had ignored her but he had never seen it happen.When the respondent asked the claimant to help Ms. B she said, "It is hard, very hard". In earlyOctober 2005 the respondent spoke to Ms. B and told her she would have to improve. Ms. B became tearful and told him that she was being undermined and not being allowed to do her job.Other than this, Ms. B had never made a complaint about the claimant's behaviour. Ms. A (therespondent's assistant) had said to him that if he did not do something Ms. B would leave. In herevidence to the Tribunal Ms. B accepted that she was not perfect: she made mistakes. However, shefelt that there was a time and place to deal with her failures. Things got worse and the claimantpulled her up about everything. Whilst the claimant did not shout at her she did raise her voice ather. Towards the end of the claimant's employment Ms. B was working only for Ms. A and therespondent. It was Ms. A's evidence that if anyone was bullied it was Ms. B who had been bulliedby the claimant.

The second dentist had a very good working relationship with the claimant. She had mentioned to him that there was tension between her and the other two assistants but it was characterised to him as not getting on well together rather than bullying. This had happened between the claimant and others in the past but it escalated more in this instance. He saw very little evidence of problems between the three assistants other than sometimes noticing silences. He did not see anything he could characterise as hostile. If he had understood the situation to constitute bullying he would have felt compelled to discuss it with the respondent. The claimant was a loyal worker but was stubborn and if you crossed the line there was no redemption.

Matters came to a head on 29 November 2005 when a patient came to the surgery to make an appointment because he had missed an earlier one some days previously. Ms. B became upset when the claimant repeatedly told the patient that it was not she but Ms. B who had made the earlier appointment. Ms. B, unable to take anymore, left for home crying and left her coat and mobile behind. Ms. A told the claimant that Ms. B had gone home and that it was her fault. That afternoon Ms. B was certified unfit for work by her doctor. A mutual friend of the assistants (MF), seeing how upset Ms. B was, visited the surgery that afternoon to speak to the respondent and collect her coat and mobile. It was the claimant's evidence that she was terrified because MF was shouting. It was the respondent's evidence that while he was "animated" and not "too pleased" he was not shouting. Ms. B spoke with the respondent on the 1 December 2005 and arranged to return to workthe following Monday.

Two days later, on 1 December 2005, the claimant complained to the respondent that the two assistants (Ms. A and Ms. B) were bullying her. The respondent asked for her complaints in writing. The Human Resources professional (HR), engaged at that stage by the respondent, met the claimant and her sister on 17 December 2005 and explained that his role was to try to resolve the matter informally. The claimant gave him her written complaints and a written record she had made noting a number of dates during November 2005 when neither of the other two assistants spoke to her. As well as her complaints of being ignored the claimant told HR that she was not given messages from some patients or when some patients telephoned wanting to speak to her they were put on hold and left and she was not contacted. The claimant also raised the issue of the procedure if someone enters the surgery in a threatening manner. They discussed her complaints at length. As well as the above complaints the claimant told HR that Ms. B's work performance made extra work for her, that Ms. B did not take well to being corrected by her (the claimant) and that she was concerned that MF might confront her on the street. HR met the others working in the practice overthe next two days. Ms. A felt that the claimant was hard on Ms. B, who was doing her best but wasscared of making a mistake. Ms. B was very upset and had to be given time to compose herself.

Shetold HR that the claimant had been rude and demeaning towards her in the reception area. Theother dentist told HR that he had no direct experience other than what the claimant had told him.She had told him that the others ignored her and laughed at her. After these meetings HR gave theclaimant feedback on the meetings and told her the situation would be revisited after Christmas.The claimant had tried to contact the respondent a number of times between 1 and 17 December2005 to arrange a meeting with him. When she got in contact with him he refused to meet her andtold her that HR was dealing with the matter.

HR arranged a mediation meeting with all staff for the 20 January 2006. In a telephone conversation with HR, prior to this meeting, the claimant enquired as to whether she would receive an apology. HR explained that the meeting was a mediation meeting not a disciplinary meeting and that he could not force anyone to apologise. HR told her that there was blame on all sides and that the other two assistants were willing to put the past behind them. The claimant was anxious about attending the meeting but HR reassured her that it was only a staff meeting.

At the mediation meeting on the 20 January 2006 HR set a number of ground rules for the staff to follow. Everyone spoke at the meeting except Ms. B who wept and was too upset to talk. The respondent was adamant that the problem was two-sided. A way forward was agreed and the claimant indicated that she was prepared to return to work subject to being certified fit by her doctor. HR felt that this was a workable solution. At the conclusion of the meeting HR was convinced that there were some inter-staff issues in the workplace but he was not satisfied that the dental assistants (Ms. A and Ms. B) had harassed or bullied the claimant and he felt that the claimant should deal with Ms. B's work problems in a more compassionate and constructive manner. There were still some tensions but HR felt it was workable. When the claimant repeatedly stated a number of times that she was out on work related stress the respondent produced one of her medical certificates at the meeting which stated she was absent on stress related illness. This annoyed the claimant. The claimant was not certified fit to return to work. Because this was a mediation meeting for all members of staff rather than a disciplinary or investigative meeting the respondent felt that representation was not appropriate at such a meeting.

On 6 February 2006 the claimant wrote to HR complaining about the meeting including the factthat she had not been allowed representation at the meeting and asking questions, in particular whether there was an allegation of bullying against her and why the respondent was adamant thatthe problem was "two-sided". The claimant complained that the meeting had been hostile and thatonce again she was left feeling the victim. HR met the claimant some days later (11 February 2006)to discuss her concerns and indicated to her that he would get the respondent to meet with her. Therespondent was given a copy of the letter.

On receipt of a copy of the claimant's letter of 6 February the respondent began to realise that his efforts to resolve the situation were not succeeding. As the claimant's absence continued the respondent realised that the practice was operating well with two assistants and that there was noneed for a third full-time assistants. The respondent wrote to the claimant on 16 February 2006 tothe effect that the inter-staff problems, to which she had significantly contributed, was interferingwith the efficient working of the practice and did not seem amenable to a resolution. In the letter heasked her to consider a voluntary severance package, the terms of which were negotiable. A day orso prior to getting this letter HR had told the claimant that the respondent believed that the best wayfor the practice to move forward was for her to accept a severance package.

A meeting was arranged for 4 March 2006. HR, the respondent, the claimant and her sister were in

attendance. The respondent told the claimant that she should accept the severance package for the good of the practice. The claimant stated that she did not want a severance package and that she wanted to return to work. The respondent encouraged her to accept the severance package and said that he "would dig deep" if she accepted it. The claimant was told that if she did not accept the severance package she would be made redundant. HR added that there was a case for selective redundancy. HR did not indicate the amount of the package. It was the evidence of the claimant's sister who was present at both the meetings of 17 December 2005 and of 4 March 2006 that the former meeting was positive but that the latter was aggressive in tone. At the latter meeting the claimant was told that there was selective redundancy in the business.

On 23 March 2006 the claimant informed the respondent that she was certified fit to return to work on 30 March. On 27 March 2006 the respondent wrote to the claimant stating *inter alia* that relationships were so strained between her and the two other dental assistants that it was now not reasonably possible to recreate a positive and professional working environment which the practice requires to function properly; that the practice can run more efficiently with two full-time dental nurses and that regrettably one dental assistant was to be made redundant; and, he again asked the claimant to *"consider an offer of a severance package due to an objective redundancy situation arising in the practice".* In the letter the respondent instructed the claimant not to return to work until further notice and he informed her that she would be paid some extra leave days on this account. Re-organisation of the practice was not discussed with the claimant between the meeting on the 4 March 2006 and the date of this letter. There was no evidence before the Tribunal as to whether it was discussed with the other dental assistants. The claimant did not return to work on the 30 March 2006.

By memo dated 12 April 2006 the respondent put the dental assistants on notice that a redundancy situation existed in relation to one dental assistant's position and attached to this memo was a blank redundancy assessment form. The selection for redundancy was based on a criteria assessment form, which assessed the competencies of the assistants. HR was not involved in completing this form; it was discussed with the second dentist. The three assistants were assessed. By letter dated 18 April 2006 the respondent informed the claimant that she was selected for redundancy because she had scored less across the critical job competencies and responsibilities than the other two full-time dental assistants. The claimant did not see the completed form. The claimant received her redundancy lump sum payment with letter dated 26 April 2006 but did not cash the cheque.

None of the three dental assistants was qualified at the time of these events. Ms. A is now qualified and Ms. B was also moving towards qualification at the last date of hearing. Ms. B is now the second dentist's dental assistant and she also compiles the accounts for his patients. There were three full-time dental assistants in the practice before the claimant's redundancy and there are now two full-time dental nurses and one part-time member of staff. The part-time dental nurse commenced employment in February 2006 and works approximately twelve hours per week. The atmosphere in the surgery is now positive, relationships are harmonious and there is "less sense of territorialism". The second dentist discussed the redundancy assessment criteria with the respondent but the respondent completed it.

Determination

The claim before the Tribunal is a claim for unfair dismissal by reason of unfair selection for redundancy.

A progressively acrimonious atmosphere developed between the claimant and the other two dental assistants. Indeed, the tension between them was obvious during the hearing of the claim. It was common case that the problem started when the claimant returned from a holiday in May 2005 and was unhappy about the amount of work left for her by the junior dental assistant and about her performance. The claimant's reaction and continuing response to this was unreasonable. The junior assistant had only joined the practice a few months earlier and her background was in retail. The respondent spoke informally to the three assistants in May 2005 about the unacceptable atmosphere in reception and urged them to pull together for the good of the practice.

Problems arose again later in 2005 and the atmosphere between the three assistants became more tense and bitter. On 29 November 2005 the junior assistant became so upset that she left work early without her coat or mobile. Two days later, 1 December 2005, the claimant made a formal verbal complaint to the respondent that the two assistants were bullying her and she left work. Thereafter, she was absent from work and submitted medical certificates for four months. The claimant had not made any complaints about bullying prior to 1 December 2005. While she had made a complaint in early 2005 that complaint focused exclusively on the junior assistant's work performance. The junior assistant had not returned to work by the time the claimant made her complaint to the respondent. Having considered all the evidence the Tribunal feels that there was a nexus between Ms. B's leaving the surgery upset on 29 November 2005 and the claimant's leaving two days later. The Tribunal further feels that when such acrimonious relationships develop in a workplace, as occurs, innocent gestures or behaviour are sometimes misinterpreted and attributed a malicious intent where none existed as happened in the new uniform incident in this case.

The Tribunal is satisfied that the respondent wanted to resolve the problem and took reasonable steps to do so. With the advice and assistance of a HR consultant he sought to deal with it through mediation rather than by a disciplinary process. At the conclusion of the mediation meeting on 20 January 2006 a consensus was reached and all involved believed that a way forward had been found. The claimant's letter of 6 February was a reversal of this. In her letter the claimant took issue with the respondent's statement that the problem was "two-sided". The Tribunal finds that the respondent's conclusion that both sides were to blame for the "odious atmosphere" was not only reasonable but it was the only reasonable conclusion in the circumstances. The Tribunal notes that while the junior dental assistant accepted that there were some problems with her performance the claimant, on the other hand, vehemently and repeatedly denied all allegations put to her in cross-examination. The Tribunal accepts the evidence that the junior dental assistant was frequently upset, embarrassed and humiliated by the claimant and accordingly it rejects many of the claimant's outright denials. The claimant's letter of 6 February was a watershed for the respondent and he began to realise that his efforts to resolve the situation were not succeeding. While the two other dental assistants showed a willingness to move forward the claimant did not show the same goodwill. The claimant turned down the respondent's offer of a severance agreement and was ultimately made redundant.

The Tribunal is satisfied that the redundancy was not a sham. The respondent realised during the claimant's protracted absence that the practice was coping well with two full-time dental assistants and that the third full-time dental assistant was surplus to requirements. At the time of the redundancy the respondent had been carrying on his practice with two full-time dental assistants for a four-month period and, since February 2006, with the addition of a part-time assistant doing twelve and a half hours per week. Along with skills and knowledge the ability to get on with others is part of the competency framework and is of particular relevance in a small dental practice interfacing with patients in a somewhat tense situation for them. A bad

atmosphere in a practice canimpact on productivity, morale and communication. The Tribunal has taken into account the factthat none of the dental assistants was qualified at the time, the long service of the claimant, the factthat the claimant and Ms. A had once worked well together but that the relationship had brokendown and the fact that there was a part-time assistant in the practice since February 2006 and itfinds that in all the circumstances of the case the behavioural competencies carried sufficient weight to be the determining factor in the selection for redundancy in this case. Accordingly, theclaimant's selection for redundancy was fair and the claim under the Unfair Dismissal Acts 1977 to2001 fails.

The claimant is entitled to four weeks notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and the Tribunal awards her €1,843.80, being the equivalent of four weeks' gross pay under those Acts, if not already paid in respect of notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)