

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1085/2006

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr M Kennedy
Ms E Brezina

heard this claim at Dublin on 10th April and 18th July 2007

Representation:

Claimant:

Mr Eddie Farrelly BL on the first day
Mr Brian Dunphy BL on the second day
Both instructed by Mr Andrew Butler, Hayes McGrath Solicitors,
91 Lower Baggot Street, Dublin 2

Respondent:

Mr Ross Maguire BL instructed by Ms Dorothy Ware,
Donal Reilly & Collins Solicitors, 20 Manor Street, Dublin 7

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute and the Tribunal dealt with the question as to whether the claimant had been dismissed as a preliminary issue.

The respondent had employed the claimant as a receptionist/administrator since January 2004. In June 2006 the respondent became aware of certain financial discrepancies involving but not limited to the petty cash system. The claimant had a particular responsibility for the petty cash system. The discrepancies were brought to the attention of the claimant on Friday 30th June 2006. On that day the claimant was suspended with pay pending further investigation and was asked to attend a meeting to discuss the issues on Monday 3rd July 2006. The respondent was not satisfied with the explanations furnished by the claimant at the meeting on Monday. The claimant and respondent agreed to meet again on Thursday 6th July 2006 in order to give the claimant a further opportunity to explain the financial discrepancies. In the meanwhile the claimant consulted with her solicitor.

On Wednesday 4th July 2006 the managing director wrote to the claimant outlining the allegations against the claimant. In the letter it was stated that if the matter was not resolved to the satisfaction

of the respondent by Friday 7th July 2006 the respondent proposed to put the matter in the hands of An Garda Síochána. On Thursday 6th July 2006 the solicitor for the claimant wrote to the respondent and expressed the view that there was no point in the claimant attending the meeting with them on that day if the matter was to be put in the hands of the Gardaí. The claimant did not attend the meeting on 6th July 2006. The claimant told the Tribunal that she had not attended the meeting because the claimant felt that she was not being believed and that her answers to the questions which might be put to her at that meeting would not change from those which she had given to the respondent at the previous meeting.

On Friday 7th July 2006 the managing director wrote a letter to the claimant in which the respondent stated that it had summarily dismissed the claimant for gross misconduct. The letter referred to a systematic pattern of non-recording of cash withdrawals from the company bank account. The respondent stated that it had concluded that the material before it, coupled with the failure of the claimant to provide any reasonable explanation, disclosed an attempt on behalf of the claimant to defraud the respondent. The respondent argued before the Tribunal that notwithstanding its issuing of a letter of dismissal, the claimant had in fact resigned by virtue of her failure to attend the meeting on Thursday 6th July 2006. The respondent accepted that it had paid the claimant up to and including Friday 7th July 2006. The respondent sought a direction from the Tribunal on this point after the claimant had given evidence on this preliminary matter.

Determination:

The Tribunal is satisfied that in refusing to attend the meeting of Thursday 6th July 2006 the claimant was in breach of her contractual obligation to attend at work at her employer's request. The Tribunal also finds that the claimant refused to comply with the lawful instructions of her employer to answer questions and furnish explanations concerning numerous financial discrepancies that had been found to have occurred and in respect of which the claimant had a particular responsibility as part of her work such that the claimant had refused to perform her contract of employment. The Tribunal notes the statement in the letter of the solicitor for the claimant dated 6th July 2006: *"In light of the differences as between the company and our client and the fact that a formal investigation is to be instigated, there is absolutely no merit in meeting at this stage."* Having considered that statement and the generality of the evidence and the Tribunal having enquired directly and specifically of the claimant herself the Tribunal is fully satisfied that the claimant intended not to cooperate with the lawful enquiries of her employer and that her refusal to cooperate was intended to be indefinite.

The Tribunal finds that the refusal of the claimant to attend at work and answer her employer's questions about financial irregularities constitute, in all the circumstances, a repudiatory breach of the contract of employment then subsisting between the claimant and respondent and that the respondent by way of its letter dated 7th July 2006 dismissing the claimant elected to repudiate that contract.

The Tribunal finds that the respondent acted reasonably and within its legal and contractual entitlements in requiring the claimant to attend at work and answer queries concerning financial discrepancies which had arisen in an area of particular responsibility for the claimant and to assign to the claimant no other work until that task had received adequate compliance by the claimant. The claimant had no entitlement to refuse to answer her employer's queries while a Garda investigation was pending. There is no right to silence or privilege against self-incrimination in the relationship between employer and employee in relation to matters within the scope of the employment.

The Tribunal notes that at the earlier meeting the claimant refused to give full answers to her employer's questions until the respondent furnished her with a substantial quantity of financial documentation. The respondent did furnish this information and the claimant then refused to attend on the basis that she had already answered the respondent. The Tribunal doubts that the excuse made by the claimant to refuse to answer at the earlier meeting was *bona fide* and the Tribunal believes that the excuse for refusing to answer at any subsequent meeting is mendacious.

The Tribunal finds that the claimant had resigned her employment by way of her indefinite refusal to follow a lawful instruction to co-operate with the investigation into financial discrepancies, and that this resignation pre-empted the letter of dismissal issued on 7th July 2006. The Tribunal also finds that the resignation by the claimant of her employment occurred in circumstances falling far short of those amounting to a constructive dismissal. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2001 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)