EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - *claimant*

CASE NO.

UD1421/2008

against

Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. B. O'Carroll
Mr. P. Clarke

heard this claim at Athlone on 7th July 2009

Representation:

Claimant(s): Mr. John Carty, Mandate Trade Union, Mary Street, Galway

Respondent(s): Mr. Duncan Inverarity, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave direct sworn evidence that she started working for the respondent company on the 12 May 1975. She worked for a total 32 years for the respondent company. She was initially employed working on the shop floor but later on in her employment she moved to the cash office area. She was employed on a full time contract and worked 39 hours per week. She worked from 9 am until 6pm Monday to Thursday and from 9am until 5pm on Fridays. In the Summer of 2003 she was granted carers leave by her employer as she was caring for her mother and children. Whilst on carers leave she worked 20 hours per week for the respondent and when her carers leave concluded she returned to work on a full time basis resuming her 39 hours per week job.

In June 2006 she applied to her regional manager hereafter known as JG for a part time contract seeking a shorter working week as her domestic circumstances had changed. Her regional manager told her that he could not guarantee her a part time position but he would revert back to her at a later stage. He did not revert back to her. In September 2007 she wrote to a director of the company seeking a part time contract. She received a reply in October 2007 stating that her request would be

passed on to the regional manager for him to discuss the request with her. The claimant was absent from work at this time due to a stress related illness. She returned to work in November 2007 and met with JG, her regional manager to discuss her request. He offered her a flexi contract which meant that she would be obliged to work a minimum of 15 hours and a maximum of 39 hours per week. This was over a 7 day week and could also include Sunday work. This contract did not suit her requirements.

On the 14 February 2008 she again wrote to the director regarding their refusal to offer her a part time contract despite having given 32 years service to the company. She was on sick leave when she wrote this letter. She returned to work on the 19 February 2008 and gave the company one weeks notice of her intention to resign. She finished working for the company on 25 February 2008 as she was left with no other option. The company refused her a reduction in her working week. Since her employment terminated she worked part time for another company but that employment ceased on 6 June 2008. Since then she has done a FAS course and is not currently in employment.

Under cross-examination the claimant confirmed that she is aware of the existence of the company's policy on grievance procedures. She did approach store management before writing to head office on three occasions. She spoke with the textile manager and two other store managers before writing to head office. She felt that she was not getting anywhere when she approached local management. She confirmed that local management had accommodated her when she had requested a change to her starting and finishing times on two occasions in January 2007 and September 2007. She did not wish to accept the offer of a flexi contract as she would have no control over how she would be rostered, and she may still have to work 39 hours some weeks. She was not prepared to accept a flexi contract.

She confirmed that she was actively seeking alternative employment before finishing working for the respondent. She handed in her notice on the 18 February 2008 to the store manager as she felt she had no option but to resign. Her local manager knew that she was suffering from ill health.

In reply to questions from the Tribunal the claimant confirmed that a part time contract where she could work from 10am until 2pm or 11am until 3pm would have suited her needs. These type of contracts were available from the respondent company previously, but were not available at the time she sought one. She confirmed that she had also requested that the company make her redundant. Between 2007 and 2008 nobody in the company had suggested that she should use the company's complaints procedures. She worked 20 hours per week for the company whilst on carers leave and the HR manager told her that such a working arrangement had worked out very well. She was in charge of the cash office when she finished employment.

Respondent's Case:

The first witness for the respondent (JG) was the regional manager. He met with the claimant in August 2006 when she requested a reduction in her working hours. He reverted back to her at a later stage informing her that the only options available were a full time contract or a flexi contract. The flexi contract allows an employee to work between 15 hours and 39 hours per week. The claimant was unwilling to engage with him over the details of the flexi contract. She enquired from him at a later stage about the possibility of being made redundant but a redundancy package was not up for discussion by the company at that time.

Under cross examination he confirmed that he was not aware whether or not the claimant was given a new contract of employment when she moved from a sales position to the cash office. He

confirmed that the flexi contract that was on offer to the claimant may have required her to work some Sundays. He has over one thousand employees and he was not prepared to set a precedent by offering a part time contract. He confirmed that the company did offer a temporary arrangement to another employee previously when she was offered an alteration to her contract. This arrangement was based on medical grounds and was a temporary arrangement.

In reply to questions from the Tribunal he confirmed that the flexi contracts were introduced by the company sometime after 2000 as set contracts which had existed previously were discontinued in 2000.

The second witness for the respondent gave evidence that she is a textile manager and has worked for the company since 1997. She became aware in September 2007 that the claimant wanted to work reduced hours. She discussed the request with the store manager and an offer of a flexi contract was made. It was her belief that the flexi contract would have helped the claimant regarding her need to work reduced hours. She confirmed that another employee had been granted reduced hours previously on a temporary basis due to medical grounds. The claimant had never told her that she would have no option but to resign if her request for reduced hours was refused.

The third witness for the respondent gave evidence that he is the store manager. The claimant approached him in September 2007 requesting a reduced hours contract. He told her later that same week that the only contract he could offer her was a flexi contract. When he made this offer the claimant walked away from him. She came into his office on 19 February 2008 and handed her resignation notice to him. He was shocked. He met with the claimant on 21 February 2008 as he wanted to ascertain if he could anything about the stress that she claimed to be suffering from. That was the last occasion he spoke with her.

Under cross-examination he denied that the flexi contract would have made the claimant's working week more unpredictable. The company would not have put her in a position where her hours would not have been flexible. A flexi contract is flexible for both parties. The claimant was previously granted carers leave as it is the company's policy to grant employees carers leave when such a request is made.

In reply to questions from the Tribunal he confirmed that the company wanted to enter into discussions with the claimant about her possible flexi hours before the contract was signed, but the claimant refused to discuss the contract. The contract did not have to be signed before discussions about her possible working hours took place.

Determination

Dismissal in relation to an employee is defined in Section 1(b) of the Unfair Dismissals Act as 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 his 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.

In advancing a claim for constructive dismissal an employee is required to show that he or she had no option in the circumstances of her employment other than to terminate his or her employment. In effect the relevant section reverses the burden of proof for an employer set out in Section 6(1) of the Act.

The notion places a high burden of proof on an employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her grievance with his/her employers. The employee would need to demonstrate that the employer's conduct was so unreasonable as to make the continuation of employment with the particular employer intolerable. The Tribunal is of the view by majority decision with Mr. Clarke dissenting, based on the evidence that the claimant did not meet the requisite threshold.

Although the claimant had approached local management on a number of occasions to express her grievances and to attempt to get working conditions and times suitable to her domestic circumstances, the action of the claimant in resigning in February 2008 after the respondent had offered her a flexi contract with options for minimum and maximum hours cannot in our view be regarded as reasonable nor could it be said that the conditions and terms, even though not then specified, which would flow from such a contract, would be intolerable for the claimant.

While expressing sympathy with the claimant and recognising her long and hitherto unblemished service with the respondent the Tribunal are of the view by majority decision with Mr. Clarke dissenting, that the claimant has not met the required burden of proof and consequently her claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)