

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIMS OF:**

Employee

against

Employer

under

**CASE NO.**

UD24/2008

MN19/2008

WT7/2008

**UNFAIR DISMISSALS ACTS, 1977 TO 2001  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

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

Members: Mr. D. Hegarty  
Mr. K. O'Connor

heard this claim at Tralee on 15th October 2008  
and 12th January 2009

**Representation:**

Claimant: Ms. Marguerite Fitzgerald, Mannix & Co, Solicitors,  
12 Castle Street, Tralee, Co. Kerry (*first day of hearing*)

and on 12th January 2009 Mr Brian Sugrue BL instructed by  
Fiona O'Sullivan solicitor, Woulfe Murphy Solicitors,  
The Square Abbeyfeale Co. Limerick (*Second day of hearing*)

Respondent: Mr. Ambrose Downey, IR/HR Executive, IBEC,  
Gardner House, Bank Place, Charlotte Quay Limerick

The determination of the Tribunal was as follows:

This is a case of constructive dismissal.

**Claimant's case:**

The claimant read her prepared statement into evidence and gave oral evidence in cross-examination.

The claimant worked for the respondent for nearly twenty-five years from 1983 and had given 100% in building up the business. She was in her mid fifties at the time of the events herein. She

began her employment for the aunt of the respondent as a pharmacy assistant. During the early years, she worked for little pay and worked every fourth Sunday for nothing. The former owner had been a good boss so not being paid for Sunday work had not been an ongoing grievance. The current owner took over the business in 1992 and had told the claimant on numerous occasions that she (the claimant) was the manageress. However, she had never been told her duties and had never received anything in writing. Her promotion to manager was not reflected in her pay. The claimant agreed that her duties could have been done by any other member of staff except for the monthly checking of prescription forms.

Despite being a manager, she did not have a key to the shop. She had refused to take a key to the as the responsibility would have been an extra headache. Another member of staff had a key. The respondent's father opened and closed the shop so the claimant had no reason to take a key, despite being a manager. There was no change of staff when the business transferred to the current owner. About five or six years ago at the claimant's request her working hours were reduced from a five to a four-day week. Her wages dropped accordingly at the time.

The claimant's written statement detailed her duties for the respondent:

1. overseeing the daily running of the business in the absence of the respondent
2. assisting with prescriptions
3. monthly recording and checking of prescription forms prior to dispatch to G.M.S.
4. customer service
5. handling of case/credit cards
6. usage of a pre-programmed software system
- 7.

The claimant had a number of grievances, which she endured over the years.

Payday for the staff was on Wednesday but the claimant often did not get paid until Friday or Saturday, when at that stage, she had to ask for her wages. In cross-examination she agreed that her days off had been on Tuesday and Wednesday. Her wages were constantly wrong, especially at Christmas time, when she would be paid by cheque on Christmas Eve but would not be able to cash the cheque until after Christmas. She only got payslips every three to four months. She did not receive a pay rise in the last six years despite being promised one at the end of 2006. The claimant never received payment for meeting and promotions that she went to for the respondent over the years. Some days, the claimant was told not to take lunch breaks, as the locum pharmacist was unable to use the computer or cash register. On those days, the claimant had to work from 9.30am until 6.00pm and could only eat while standing. She had never raised an issue about working those lunchtimes because she is an obliging person. The respondent kept changing the claimant's off day but she had not complained about this. In early 2007, the claimant asked the respondent to pay her for working her day off. However, she only received pay on one occasion. Instead, when she worked her day off, she was told to take an alternative day off. It was from this that it became obvious to the claimant that the respondent was trying to get rid of her. The claimant had complained that she never received her holiday pay prior to going on holidays. While on holidays, she received telephone calls from the respondent and she always answered them.

About six years ago, the claimant had made enquiries about joining a trade union. When she had informed the respondent about her plans to join a union, she was told that anyone joining the union would be sacked. She therefore had to abandon the idea. The claimant mentioned to the respondent about an employer's obligation to offer employees a pension scheme. Despite the respondent's promise that someone from the bank would come in to discuss it with them, nothing

more was heard about pensions.

On the instructions of the respondent, the claimant dispensed prescription medication behind the back of locum pharmacists, having got the loan of same from other pharmacies. This put the claimant under pressure, but failure to carry out the instruction would have resulted in a telling-off or maybe losing her job.

On one occasion, after the respondent had taken over the business from her aunt, she had searched the claimant's handbag without the claimant's permission. Because of this incident, the claimant had never brought a handbag to work again.

During the month of November 2007, the respondent had sent MD on a management-training course. Despite the claimant being the manager and having worked on her own initiative when the need arose, she was not invited to do the course but felt that she was kept in the dark and overlooked because of her age.

On Friday 23 November 2007 at 6.00pm, the claimant was talking to another employee (MX) when she turned around and found the respondent smiling and waving to MX behind her (the claimant's) back. The respondent went red with embarrassment and the claimant was shocked and felt humiliated. She was hurt by the incident but had only seen such gesturing on that one occasion. She had not challenged the respondent about it.

In the lead up to Christmas 2007 the three young female employees were given evening overtime and she had neither been offered it nor informed about it. When she raised this with the respondent, she told her that she had taken her age into consideration. The claimant maintained that she was told that the young ones were being brought in because she was too old. If overtime was on offer, she should have been given the option of doing it. The claimant felt she was victimised because of her age.

The respondent telephoned her on Monday 26 November and wanted her to come to a meeting on Thursday 29 November at 6.00pm. She told the respondent that she was on holidays and was not due back to work until the following Saturday. The claimant had earlier agreed to work on Sunday, 2 December. No reference was made to the Sunday work during that telephone conversation. Then on Tuesday 27 November the respondent cancelled her Sunday work in a telephone call. In cross-examination it was the claimant's evidence that she did not raise an issue about the cancellation at the time because there was someone in her house. The claimant felt that the respondent cancelled her Sunday work to get back at her for not attending the Thursday night meeting.

In a further telephone conversation later that week the claimant asked for the reason for the loss of her Sunday work and was told that considering her age, the young ones were being brought in to work. The respondent was aggressive and shouting on the telephone and as the phone was on loudspeaker the claimant's husband heard the conversation. He took the telephone and asked the respondent about the Monday lunch hours that the claimant had worked and for which she had not been paid. In reply, the respondent referred to a house-warming gift, a bottle of champagne at holiday time and a Christmas bonus that she had given the claimant. When the respondent asked if the claimant wanted to leave the company her husband replied, "If that's what you want then give her redundancy". He also said that he would return the house warming present and pay for the champagne. The claimant's husband left the house warming present in the porch of the respondent's home and informed her of same by mobile. He

went to the shop with a medical certificate on behalf of the claimant and put €50.00 for the champagne on the counter. The medical certificate stated that the claimant was suffering from stress related illness.

Around this time the claimant discovered from the Citizen Advice Centre that she had been entitled to written terms and conditions of employment from the respondent, which she had never received. Her husband handed in a note with this information on it to the shop. The respondent, two staff members and two customers were in the shop at the time. He had not intimidated anyone.

On several occasions the claimant had asked the respondent what she (the claimant) had done wrong because the respondent appeared to be annoyed with her. The respondent had replied that it had nothing to do with the claimant. In mid November 2007, the respondent was very aggressive towards the claimant so she asked again on numerous occasions what she had done wrong, and whatever it was, it should be said to her. Because of the stress of this working environment, the claimant is currently attending a doctor and being treated for stress related illness.

The claimant maintained that the respondent had been trying to get rid of her and this had been going on all year. The claimant resigned her position by letter dated 6 December 2007. A medical certificate was also enclosed with her letter of resignation. The claimant explained that she had done this so as to give notice. The respondent had no verbal or written grievance procedures. If there were any issues, a person approached the respondent about it but if the reply was unsatisfactory, there were no further avenues available. From that time, the respondent has made no contact or enquiries about her well being so, from this lack of contact, it was obvious to the claimant that the respondent had wanted her out.

The claimant was proud of being a manager in the respondent's shop. She had done the monthly recording and checking of prescription forms and no other staff did these. The claimant was shattered by the reference to her age and felt that she was for the scrap heap. The cut in her hours had affected her health as she could have done with the overtime and the Sunday work.

A letter dated 22 September 2008 from the claimant's doctor was opened to the Tribunal. It confirmed that the claimant had attended her surgery on 27 and 29 November in a stressed condition regarding her work and was put on medication. In cross-examination the claimant confirmed that she had been taking antidepressant medication daily for about twelve months prior to the termination of her employment. This had been because of what was going on. She agreed that there had been other pressing issues in their lives in 2006 and 2007 in relation to a property transaction and family but these issues did not have an impact on her. She agreed that she had confided issues of a personal nature to the respondent and her husband had been the respondent's gardener but the respondent was her employer and not her friend and they did not have a personal relationship. In reply to questions from the Tribunal the claimant confirmed that she had been on medication for stress for two to three years prior to problems with this house and added that everyone has stress in their lives.

The claimant felt that she was given the title of manager because she had been in the employment for such a long time. She had nothing in writing to confirm that she was a manager. Doing staff rosters did not form part of her duties as a manager. Being a manager was just a title. Despite being a manager, she did not know how the business was doing. Her relationship with the respondent had been up and down. She confirmed that she was paid for any overtime that she worked but did not work any overtime from October 2007 until the time of the termination of her employment.

It had been the build-up of things over the years that had led to a breakdown in the relationship and to her claim for constructive dismissal. She had never been told that the respondent wanted to sort things out or that her job had remained open until May 2008. She had been on 5mg of antidepressant medication prior to the termination of her employment and now she was on a larger dosage of antidepressant medication, sleeping tablets and was seeing a counsellor. The antidepressant medication had been prescribed because of her complaints in relation to her work.

### **Respondent's case:**

The respondent/owner of the pharmacy returned home in 1992 from Scotland where she had been studying. She began working in her aunt's pharmacy and two years later in 1994 she bought the pharmacy from her aunt. In 1998 the entity became a limited company. She knew the claimant since she was a child and worked with the claimant since 1992. For a period of time she and her aunt and the claimant worked side by side. The respondent took the view that they worked well together.

The respondent never had need for a manager. The claimant did not like the responsibility of handling keys or of cashing-up. The claimant did exactly the same work as the other employees and the respondent never needed to make any such distinctions between her employees. She saw the claimant as an asset. She was a trusted and loyal employee who was intelligent, caring, kind and very good with the elderly. The respondent had no work performance issues with her. If the respondent had any problem the first person she would call would be the claimant and they would tackle the problem together. They confided in each other. Work was a sanctuary for the claimant. She had never had a cross word nor any disciplinary issues with the claimant.

There are five pharmacies in the town. Four of these are involved in a rota system to ensure that at least one of the pharmacies is open on bank holidays and Sundays from 11.00 a.m. to 1.00 p.m. (or possibly until 1.10 p.m if Mass is delayed). The employees get double pay for these days. None of the employees would have to work a Sunday and a bank holiday as well. Each employee works only a few Sundays each year. The only other overtime that arises is at Christmas time, stocktaking and perhaps one other day in November.

The claimant had expressed a wish many years previously to work four days rather than five days. Her days were Monday, Thursday, Friday and Saturday. Initially when the claimant reduced to four days the respondent deducted a day's pay from the claimant. However when the claimant raised issue about the reduction the respondent gave her the five days' pay for four days' work.

Because they all had to work so closely together she told them if they have a problem to talk to her and they would sort it rather than leaving it to fester. There were no grievance or performance issues with the claimant. The witness was adamant that the claimant did not suffer from work related stress; she was happy at work. The claimant difficulties were of a domestic nature and work was a sanctuary for her. She allowed the claimant time off for domestic situations that arose and she paid the claimant in full for those days. On one occasion the claimant was very distressed and the respondent offered her accommodation over the pharmacy. The respondent had difficulties with the claimant's husband. If an employee had a problem the respondent told her to take as much time off as she needed and she would get full pay. She regarded such time off as compassionate leave. When the claimant developed some serious health conditions she told the claimant to take as much time off as she wanted.

The witness described the events leading up to the claimant's resignation in or around December 2007. The pharmacy was to open on Sunday, 2 December 2007 and the claimant was to be on duty. It is not a busy day. On Tuesday 27 November the respondent telephoned the claimant to say that she should take the Sunday off and relax as there would be plenty of busy days over Christmas. The claimant was brusque with her about this. The witness believed that she was doing the claimant a favour because she never wanted to do overtime or never volunteered for it. Had the claimant told her that she wanted to work that Sunday then they would not be before the Tribunal.

On Wednesday, 28 November the claimant telephoned her and told her that she had to go for a heart assessment for work related stress. She told the claimant to take whatever time she needed. The claimant's husband then spoke on the phone to her. He was intimidating and confrontational. He was complaining that the claimant had not been paid for the lunchtime hour on Mondays. The respondent was flabbergasted. She never deducted time from the claimant, even when the claimant was absent doing her own private business. The respondent was very upset. When he asked him if the claimant was so unhappy that she wanted to leave he responded, "Why don't you give her redundancy if that is the case". She told him that she did not want the claimant to leave.

Later that day the claimant's husband came to the shop and told her that he had left the house-warming present in her porch and handed her €50.00. She told him that she did not want it, that it was for the claimant but he threw it on the counter. She handed the claimant's wages to him in an envelope. He told her that she did not need them and threw the envelope back at her. On her solicitor's advice she later sent the wages by registered post. The claimant's husband returned to the shop later that day. He was smirking and handed her a note with an employment rights telephone number on it and the words "terms and conditions of employment form which is normally given to employees after two months" written on it and he went on about not paying the claimant for the lunchtimes she had worked. The respondent was flabbergasted. The claimant's conditions of employment had not changed since she took over the pharmacy. The respondent as well as the employees had been intimidated by the claimant's husband's visits to the shop. She never had a cross word with the claimant or put her under pressure. However, she had on a regular basis encouraged her to go on courses but she always refused. The respondent was not happy about this but let it go.

On 11 December 2007 the respondent's solicitor sent a letter on her behalf to the claimant stating that the claimant had been a valued and trusted employee, rejecting her claim that her stress was work related, referring to the respondent's bafflement at the return of gifts given to her, expressing disappointment that the claimant was not returning to work, welcoming her to the shop at any time and asking that the claimant's husband not contact the respondent or her family or enter the pharmacy or the respondent's property. This letter crossed with a letter from the claimant's solicitor indicating that she was claiming constructive dismissal.

After this there were silent telephone calls to the shop. These calls came in blocks. Calls also came from a particular man asking if the respondent understood that the claimant had gone, telling her that she will regret it and that it will be detrimental to her business. When her parents received a phone call to similar effect from the same man the respondent contacted the Gardaí.

The claimant did not return to work. She kept her job open until May 2008. She had no problem with the claimant. The claimant's sister asked if she could come back and the respondent said she could. The claimant's husband's brother still comes into the pharmacy. The respondent knew that

the claimant did not like her to phone her at home while she was on holidays. The claimant does not have a landline and she would not phone the claimant on her mobile because her husband monitors it. Furthermore, she felt that if she phoned the claimant it would be used against her.

Employees are paid on Wednesdays. The respondent faxes the hours to her accountant in Dublin on either Tuesday or Wednesday but these are the claimant's days her hours might not have been faxed in with the others on some occasions. She had never told the claimant that she would be sacked if she joined a trade union. The respondent's husband is a shop steward. It was the claimant's right to join a union if she wished. Whatever the claimant wanted to do was fine with her. She did not recall receiving a form about a trade union. She had never dismissed anyone in her life.

Towards to end of 2007, on her accountant's advice, she had given a pay rise to the employees. The pay rise before that had been in 2005. She had complied with her legal obligations as regards employee's pensions. She had contacted the AIB and on the advice received had told her employees that they should attend a meeting on the matter but they were not interested in a pension. A certificate of compliance with the relevant section of the Pensions Acts 1990-2002 was produced in evidence. The claimant had requested time off in lieu of pay when she worked her day off. This was because her husband was on a disability allowance and paying her would have tax implications.

The respondent was particularly upset by the claimant's reference to monies collected for mass bouquets that she had left in the pharmacy at the time of her resignation. This money had been forwarded to the missionary society. Following the first day of hearing the respondent explained the situation to a monk in the particular society and his letter confirming receipt of the money was produced in evidence.

There is a loan agreement between the local pharmacies to cater for situations when a pharmacy runs out of a medicine. She had never asked the claimant to give out medicines without a prescription; she employs locums to deal with prescriptions in her absence. Some people have ongoing prescriptions. In the case in question they fill a weekly pillbox for an elderly client.

She got no chance to explore the cancellation of the Sunday overtime with the claimant during the second telephone conversation because her husband became involved and totally intimidated her. She had never called the claimant old or even considered her old. Nor had she referred to the other staff as the "young ones". The claimant was a friend and she had hoped that that they would see out their time together. When relevant she gave the claimant her choice as to whether she would do the Sunday or bank holiday overtime. The respondent did not accept that every interchange between them caused the claimant stress. The respondent tries to keep the working atmosphere positive. If she had a problem she keeps it from the staff. Her full-time staff are with her for several years and she had never had to dismiss anyone. They are comfortable coming to her with their issues.

Tension arose in November because she had not offered the claimant the opportunity to attend a management course and had taken MX instead. She had not offered it to the claimant because she had refused to go on courses so often before. The course was relevant to MX's working the pharmacy. It was an information day. Christmas shopping is done every June and involves an overnight stay in Dublin. The respondent offered the claimant the opportunity to go on this but she refused it every year. Clarins is the only promotional event and all the employees, except the claimant, attend it every year. The claimant was not in a management position. She had asked the

claimant to do lunchtime five times in 2007 to cover for the other employee who was not available on those occasions. She paid for the claimant's lunch on those occasions. That employee had covered for the claimant if she was missing. They all work as a team. She had never asked the claimant to keep large amounts of money in her home when she was away for several weeks. The only time she was absent for several weeks was when her daughter was born in 2005. She pays her employees by cheques.

**Determination:**

In cases of constructive dismissal the onus of proof is on the employee to show that because of the respondent's conduct she was entitled to or it was reasonable for her to terminate her contract of employment with the respondent.

There was a long-term work and personal relationship between the parties, even if the personal relationship was confined to the work place. The Tribunal is satisfied that there was a serious rupture in that relationship. Many of the claimant's complaints refer to matters in the past and others relate to ongoing matters. However, except in one or two instances the claimant never raised these issues with the respondent. When she did raise the issue about her pay with the respondent, when she changed to working a four-day week, the matter was immediately addressed to the claimant's satisfaction. Furthermore, most of these complaints were unfounded.

The events of the last week of November were critical in the breakdown of the relationship. On Tuesday 27 November the respondent, believing that she was doing the claimant a favour, telephoned her to tell her she need not work on Sunday, 2 December. Whilst the claimant was unhappy about this she did not indicate her dissatisfaction to the respondent. In their next telephone conversation, when an opportunity had arisen to explore the issue with the claimant, her husband became involved and the matter quickly went downhill thereafter. The Tribunal accepts the respondent's version of that involvement and the effect it had on her. By letter dated 6 December 2007 the claimant submitted her resignation. Medical certificates to the effect that the claimant was suffering a stress related illness were submitted to the respondent for the period 1-15 December. Having considered all the evidence including the events subsequent to the claimant's resignation the Tribunal unanimously finds that the claimant failed to discharge the onus of proof under the Acts. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

This being a case of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 does not arise. As no evidence was adduced in relation to the claim under the Organisation of Working Time Act, 1997, that claim is dismissed.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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



