

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - *claimant*

CASE NO.
UD1342/2006
MN889/2006

against

2 Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Reid
Ms M Mulcahy

heard this claim in Dublin on 7th May 2008 and 15th July 2008 and 16th October 2008 and 17th October 2008 and 23rd February 2009

Representation:

Claimant(s): Mr Andrew King BL instructed by Mr Barry Creed of McDermott Creed & Martyn, Solicitors, Constitutional Buildings, Stephen Street, Sligo.

Respondent(s): Ms Rosemary Mallon BL, Mr John V. O'Dwyer of Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

The Tribunal heard an application by the solicitor for the claimant for a postponement, on the fifth day of hearing. The claimant was not present. The Tribunal refused the application. The solicitor for the claimant then withdrew the claim of the claimant.

The Tribunal had received, by fax on Friday 20th Feb 2009, correspondence from the solicitor for the claimant indicating that they would apply for an adjournment on Monday morning. The solicitor for the claimant had also sent by fax on the same date, Friday 20th February, indicating that they were going to make an application for a postponement on Monday 23rd February 2009 morning and referring to four telephone calls made to the respondent's solicitor's office, and a letter of the same date, the solicitor for the claimant also indicated that he had asked his counsel to contact the respondent's counsel and advise her of the difficulty. The Tribunal is satisfied that the solicitor for the claimant had made all reasonable efforts to make an application for a postponement as soon as practicable and has no issue with the failure of the claimant's

solicitor to make an application on Monday rather than on Friday. The solicitor for the claimant gave his reasons for not making application on Friday and the Tribunal is satisfied that his approach was reasonable.

Counsel for the respondent objected to the postponement on the grounds that there were only two witnesses left for the respondent, that Ms D's evidence would take about ten minutes and the other witness Mr O'D was not accused of bullying or harassing the claimant. Counsel argued the balance of convenience test be applied if the case was adjourned it would be months before it would be reheard. Counsel suggested that the claimant's legal representatives could take telephone instructions and the respondent would have no objection to sufficient time being given to take phone instructions. The solicitor said he only found out Friday morning about the claimant's illness, he advised her to attend a doctor and obtain a medical certificate. He contacted the solicitors for the respondent.

The Tribunal notes that some of the letters are incorrectly dated and the Tribunal was advised that the correct date on all the letters ought to be 20th February 2009 and the Tribunal accepts that as being the correct date. The medical certificate simply states that the claimant was suffering from "stomach bug/virus" and was unable to attend work from Friday 20th February 2009 until Monday 23rd Feb 2009. Counsel for the respondent made a point that it was unclear whether the dates certified were inclusive of Monday 23rd February. The Tribunal was of the view that the benefit of any doubt should be given to the claimant in respect of the dates certified. It appears to the Tribunal that the natural interpretation ought to be inclusive of Monday 23rd February, in any event.

The Tribunal rose to consider the application for a postponement and on its return gave its decision and a summary of its rationale. The Tribunal indicated that the reasons given orally were for the assistance of the parties and that the final and correct rationale of the Tribunal in reaching its decision was to be found in the written determination when issued.

The solicitor for the claimant then sought time to consider his position and take instructions by telephone. The Tribunal rose and on its return the solicitor for the claimant withdrew the claimant's case and indicated that he was doing so in the light of the decision of the Tribunal to refuse the application for postponement. Solicitor for the claimant indicated that the claimant may wish to take the matter further in another forum.

The Tribunal expressed its concern and enquired as to whether it had been fully considered that by withdrawing her claim the claimant might possibly be prejudicing any appeal which she might choose to make to the Circuit Court, for example, on the basis that her claim having been withdrawn by herself and therefore the Tribunal had reached no determination on the matter that could be subject of an appeal to the Circuit Court. The Tribunal also expressed its concern that by withdrawing her claim the claimant might likewise prejudice any application for judicial review of the refusal, by the Tribunal, to grant a postponement, on the basis that her claim being withdrawn she was not adversely affected by the refusal. The Tribunal indicated that there may be many issues arising out of the withdrawal for the prospects of the litigation in another forum and stated that its concern was that the claimant's legal representatives have adequate opportunity to consider all of these issues prior to withdrawing the claimant's case. The Tribunal stated it was not indicating a view on any issue, that ultimately there may be no difficulty and that it was not for the Tribunal to advise. The Tribunal was merely attempting to identify potential issues prior to the withdrawal of the claim of the claimant. The Tribunal had been advised earlier that counsel for the claimant was available by telephone and that counsel could attend should the application for postponement be

refused. The solicitor for the respondent was making the application for a postponement in the absence of his counsel.

The Tribunal having identified these potential issues then gave the solicitor for the claimant the opportunity to consult by phone with his counsel, unfortunately it turned out that counsel was not available to take his call. Upon its return the solicitor for the claimant advised the Tribunal that he was satisfied to withdraw the claim.

Counsel for the respondent then indicated that it was withdrawing its objection to the postponement. Counsel for the respondent referred to the Connaught Gold case and the decision of Iarfhlaith O'Neill J, where it was held by the High Court that the Employment Appeals Tribunal was not the *legitimus contradictor* and that for the purposes of costs the notice party was the appropriate party. Having advised her clients of this matter counsel for the respondent then indicated that the respondent was withdrawing its objection to the earlier application for a postponement. The respondent then invited the Tribunal to reconsider its earlier decision in the light of the withdrawal of the objection to the postponement.

The Tribunal sought clarification of the respondent's position and specifically whether the respondent was now applying for the case to proceed. Counsel for the respondent indicated that she was not making any such application. The Tribunal indicated that it considered this turn of events to be somewhat unusual. It appeared to the Tribunal that the respondent was inviting the claimant to renew her application for a postponement in circumstances, which might reduce her opportunity to recover costs against the respondent, should she apply for judicial review of the refusal of the Tribunal to postpone the hearing, and be successful in her application.

The Tribunal, in ease of the parties, stated that it was not disposed to vary its decision merely because the respondent had withdrawn its objection for reasons that appeared to exclusively relate to the avoidance of costs on judicial review and not for any other substantial reason. The solicitor for the claimant then declined to renew his application for postponement.

The Tribunal stated that it made its decision to refuse the postponement on the merits, and that the presence or absence of a mere or bare formal objection to a postponement by the respondent was not, in the view of the Tribunal, sufficient to cause the Tribunal to vary its decision.

The Tribunal refused the application for the postponement on a number of grounds, which it weighed carefully. Those grounds are as follows: -

- The case had been set down especially for the whole day and to grant the postponement would mean the loss of a full hearing day. The Tribunal is conscious of its duty to husband its resources and the Tribunal is loath to grant a postponement in circumstances in which another case cannot be inserted in its stead.
- The claimant had completed her evidence in chief and had been fully cross-examined and that therefore, her presence was not required as a witness.
- The claimant was represented by a solicitor and the Tribunal was advised that her counsel could be present as soon as required should the hearing continue. The solicitor and counsel for the claimant must already have had the benefit of extensive instructions in a case, which had already run for some four days, and that should any new matter arise, in respect of which the claimant's legal representatives required instruction, the Tribunal would provide

the representatives with ample opportunity to take instructions by telephone. The Tribunal notes that the respondent had indicated that they would have no objection to such a course.

- There were only two witnesses left to give evidence and one of those had almost completed giving her evidence at the previous sitting, during which the claimant had been present. The second witness was a regional supervisor employed by the respondent and the Tribunal was of the view, having heard the rest of the case and read the documents provided to the Tribunal, and in particular, having heard the claimant give her evidence in chief, and be cross-examined, the Tribunal has come to the view that any facts in issue between the parties in respect of which the second witness could give evidence, or be cross-examined, were of a lesser order of magnitude. The Tribunal was of the view that the differences could be worked around without any great prejudice to the claimant.
- The Tribunal notes that the claimant had applied for a postponement at the commencement of this case because she had changed her representation shortly before the first hearing day. A division of Tribunal had initially refused the claimant's application for a postponement. The application was then renewed before a different division of the Tribunal and at the hearing of that application the respondent appeared and consented to the claimant's application, which was then granted. This application was heard and granted shortly before the hearing date with the result that a half-day of hearing time was lost.
- The Tribunal is cognescent of the need for both parties to obtain closure. The case had been lodged with the Tribunal on 14th December 2006 and had already gone on for four days, and should a postponement be granted it was unlikely that the case could be listed for a hearing any sooner than the 5th May 2009, which is the next available full day on the Tribunal list for Dublin. The witnesses had travelled to Dublin to be present for the hearing and costs and inconvenience had been incurred and the Tribunal is anxious that no further time and expense be incurred unnecessarily.
- The Tribunal was not satisfied that doctor's sick certificate was adequate proof that the illness was of such gravity that the claimant could not attend at the hearing for the purpose of carrying out those functions that might reasonably anticipated to be carried out by the claimant at this stage of the case and in circumstances where the Tribunal could be expected to extend to the appellant every courtesy.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)