

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD1541/2008
RP1399/2008
MN1488/2008
WT632/2008

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Mr. D. Hegarty
Mr. J. McDonnell

heard these claims in Cork on 2 September 2009 and 10-11 November 2009

Representation:

Claimant(s):

Mr. Pdraig Cullinane BL instructed by
Ms. Patricia Murphy, CP Murphy & Co, Solicitors,
2nd Floor, 129 Oliver Plunkett Street, Cork

Respondent(s):

Mr. Eamonn McCoy, IBEC,
Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

In this case the Claimant commenced her employment with the Respondent on the 7th of February 2005. She claims that she was constructively dismissed by virtue of the conduct of her employer between late 2007 to early 2008 when the Claimant was recovering from breast cancer.

The Claimant gave evidence that she was employed as a merchandiser in the Respondent's

department store in Mahon in Cork. The Claimant was happy in her job initially but unfortunately was diagnosed with breast cancer in early 2006 and had a harrowing period during which she underwent surgery, radiotherapy and chemotherapy before returning to work with the Respondents.

At the time of her return the Claimant encountered what she perceived as “difficulties”. She felt “that she was being pulled in all directions”. She did not know which supervisor she was answerable to and when she enquired, was given little or no assistance. There were a number of incidents which caused the Claimant considerable upset. These culminated in an event that occurred on or about the 16th of May 2008 when the Claimant was doing her job in the store and got a fit of coughing. A male colleague came to her assistance. A supervisor who observed this event made a complaint that she and her colleague had been acting inappropriately in the presence of customers in the shop.

This gave rise to a sequence of events in which the male colleague was reprimanded and this was brought to the attention of the Claimant.

The Claimant was extremely upset about this as she felt it was a slight on her character and she told her husband about it. The entire incident became a source of considerable upset and distress to her. She complained to her supervisor about the entire matter but felt that the incident was trivialized by her supervisor and consequently she complained to the store manager.

The Claimant alleges that she requested that the CCTV tapes in the shop be reviewed so that the truth of what happened might be confirmed. This was declined. The store manager appointed his deputy to carry out an investigation. This was done over the next few days.

The Claimant said she was not happy with the outcome of the investigation and she repeated her requests to have the CCTV footage reviewed. Management offered mediation between the Claimant and her supervisor but the claimant did not avail of this.

The Claimant conceded that she had the benefit of her shop steward’s advice at her meetings with management. After the investigation the Claimant went on certified sick leave. The Claimant heard nothing further from the company and never returned to work. She continued, however, to receive payslips and to hand in medical certificates until early the following year.

Evidence was given on behalf of the Claimant by her Consultant Psychiatrist. She first saw him some 6 months after she had left the employment of the Respondent and she was referred to him by her Solicitor. He was concerned about her wellbeing and liaised with her General Practitioner. He diagnosed depression which he conceded was multi-factorial but he felt that it was primarily due to stress at work. He conceded that the contents of a letter produced at the Tribunal from the Claimant’s Consultant Medical Oncologist in May 2008 was probably accurate. The letter stated “*she has been a patient since April 2006 and has been on active treatment since then, this has been a very difficult and stressful time with repeated potentially disease related symptoms, difficulties with therapy and she has been very stressed with her illness related to its treatment and related to concerns that the cancer might come back*”. He goes on to say “*she is experiencing difficulties at work related to this stress and I would be grateful if this could be treated compassionately*”.

Various witnesses gave evidence on behalf of the Respondent company. This evidence confirmed that the supervisor had witnessed the “coughing” event and had made a complaint to the Claimant’s own supervisor. Some disciplinary action in the nature of a reprimand was given to the Claimant’s

male colleague. The store manager was approached by the complainant and he asked his deputy manager to carry out an investigation into the “coughing” event and other concerns that the Claimant had.

The deputy manager described interviewing all the parties and coming to a series of conclusions which she outlined to the Claimant. She said that the Claimant did not express dissatisfaction to her but went on certified sick leave shortly after she had told her the outcome of the investigation and never returned to work. The deputy manager had inter alia recommended mediation between the Claimant and her supervisor which the Claimant did not avail of.

She said that the interview with the Claimant’s work colleague had more to do with his general performance than it had with the incident itself. She felt that the incident was of no consequence but that the matter had escalated unnecessarily. She did not recall the Claimant asking to view the CCTV footage and relied on a contemporaneous note taken by her own assistant at the interview which made no reference to any such request.

Determination:

The claims under the Redundancy Payments Acts, 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Organisation of Working Time Act, 1997, are dismissed for want of prosecution.

The Claimant in this case claims to have been constructively dismissed by virtue of the actions of her employers. Section 1 (b) of the Unfair Dismissals Act 1977 provides that dismissal includes *“the termination by the employee of his contract of employment with 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 contact of employment.”*

The Claimant in this case has not satisfied the Tribunal that she was constructively dismissed or that her treatment at the hands of her employer was such that would justify her resigning from her employment. Indeed the Tribunal finds that the employer acted reasonably in relation to the matter and that the investigation carried out was fair and balanced and might well have led to a resolution of the matter if the Claimant had followed through on the mediation process that was suggested.

However the Tribunal noted in the course of the hearing that the Claimant was unable to explain her employment termination date of the 13th of November 2008 given on the T1A. Indeed she had continued to submit medical certificates for a number of months after this date. Indeed the Tribunal are satisfied that the Claimant was not even aware of the existence of her Solicitor’s letter of the 13th of November, indicating her resignation, until the final day of the hearing.

Consequently, the Tribunal unanimously finds that the contract of employment as between the parties subsists and was never lawfully terminated by the Claimant or the Respondent. It is open to the Claimant to proceed with the mediation procedure if she so wishes as suggested by the Respondent as the claim under the Unfair Dismissals Acts, 1977 to 2007, is dismissed.

The Tribunal finds that the Claimant was not constructively dismissed or indeed dismissed at all

within the meaning of the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)