

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD1483/2008

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Mr. P. Casey
Mr. D. McEvoy

heard this claim in Cork on 18 September 2009 and 25-26 November 2009

Representation:

Claimant(s) :

Ms. Cliona Kenny, Ernest J. Cantillon & Co., Solicitors, 39 South Mall, Cork

Respondent(s) :

Mr. Jim Reaney, IBEC, Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:-

In the claim to the Tribunal it was stated that the claimant, a youth worker, commenced employment with the respondent on 1 February 2006 at a youth centre in Farranree, Cork. It was alleged that she was constructively dismissed on 11 February 2008.

Respondent employees (TD, MS and ML) allegedly began to undermine, humiliate and bully the claimant within weeks of the claimant commencing her employment. Initially such incidents were infrequent but they grew in intensity leading up to Xmas 2006. The employees made the claimant feel unwelcome, upset and intimidated. She was ignored and her requests and directions were disputed or not carried out.

The claimant initially made a verbal complaint to the respondent which resulted in a meeting held on Friday 8 December 2006 at the respondent's headquarters at St. Patrick's Hill, Cork.

Despite attempts to resolve the conflict within the workplace, the claimant was allegedly subjected to repeated bullying and intimidating behaviour by the other members of staff (and, in particular, TD). As a result, the claimant made a formal written complaint on 30 July 2007. At this point, the claimant was suffering from severe anxiety, mental distress, and, allegedly, post-traumatic stress.

As a result of feeling unwell the claimant began to attend a counsellor in or around February 2007 and on 1 August 2007 she attended her counsellor and her GP and was certified unfit for work due to stress. She was on sick leave from work from 2 August 2007 to 11 February 2008.

There were a number of informal meetings between the claimant and her employer but despite her formal written complaint no investigation was commenced and no measures were taken by her employer to resolve the issues at work.

As a result, the claimant felt that she had no alternative but to resign from her post. She sent a letter of resignation on 11 February 2008 and confirmed that was as a result of the alleged work-related stress that she had suffered.

In its response to the constructive dismissal claim the respondent, disputing the claim, said that the claimant had not been constructively dismissed but had resigned from her position due to health reasons. The respondent reserved the right to raise further grounds of defence and to adduce evidence at the Tribunal hearing.

As part of the claimant's claim, the following were given as relevant incidents:

The other employees (and, in particular, TD) repeatedly criticised the claimant's work, plans and decisions regarding how the programmes at the centre should be run.

On 16 /17 October 2006 at a meeting (which included all employees together with the claimant's line manager and the FAS supervisor) TD criticised the claimant by saying that there was a lack of communication and that the claimant did not discuss or inform the other employees as to the operation of the centre. It was alleged that this was not true and the claimant denied that there was a lack of communication on her end.

In or around June 2007 the claimant was verbally attacked by TD. She was shouted at in an aggressive manner over the fact that a member of the local convent had given out to him over the claimant's car being parked within the convent grounds.

The claimant was ignored by the employees within the centre (namely TD, MS and ML) and her directions were either not followed (or they were ignored) or they were criticised repeatedly.

The respondent failed to take action and investigate the claimant's formal complaint of bullying in the workplace which she made in writing on 30 July 2007. No attempt was made to set up an investigation into her complaint and no attempt was made to resolve the situation.

In a submission to the Tribunal the claimant's representative alleged that the claimant had been bullied almost from the start and that she had repeatedly told managers of this but that the situation had got progressively worse. There was a series of meetings. The claimant attended a GP and a

counsellor. She told the respondent of this. On 2 August 2007 the claimant went out sick. She had made verbal and written complaints. Over six months later nothing had happened. The claimant resigned feeling that she could not remain an employee of the respondent.

In a submission on behalf of the respondent, the respondent's representative said that the claimant had gone absent from work due to sickness on 7 August 2007 and had continued to send medical certificates to the respondent until January 2008. The claimant continued to receive payment under the respondent's sick pay scheme until then (January 2008). On 11 February 2008 the claimant sought her P45 from the respondent tendering her resignation (in writing) due to work-related stress. The claimant was now claiming to the Tribunal that she had had to resign because a bullying claim was not properly investigated. The respondent was now totally rejecting this claim and wished to demonstrate to the Tribunal the efforts that it had made to properly investigate the claimant's claims. The respondent wished to demonstrate that the claimant had failed to engage with the internal procedure for dealing with such claims despite being advised both internally and externally to do so.

The respondent was disappointed that the claimant had chosen to take this course of action. It believed that, if the claimant had chosen to use the internal procedures for dealing with bullying claims, this matter could have been resolved.

The respondent was of the strong belief that the evidence adduced at the hearing would show that the claimant had faced difficulties in adapting to the challenges of her role in the respondent organisation but had chosen not to avail of internal support mechanisms. She had had a strained working relationship with a number of her colleagues due, in the main, (it was submitted) to a lack of communication and a clash of styles and personalities. This had led to a number of complaints to management about her from her colleagues. It was submitted that these complaints had been investigated using internal procedures and that, in general, they had been resolved to the satisfaction of all parties.

After days of oral evidence and cross-examination the claimant's representative submitted that it had been shown that the claimant had met the requirement of the unfair dismissal legislation that, because of the conduct of her employer, she would be entitled or that it would be reasonable for her to terminate her contract of employment. The respondent had a duty to her under health and safety legislation and under the code of practice on bullying. There had been a lack of fair procedures regarding meetings. The claimant had not been advised of all matters to be discussed. She had been denied the right to union representation. The claimant's issues had fallen within the scope of the respondent's procedures. By 20 July 2007 she had complained that TD was a bully. She was attending a counsellor and suffering illness due to bullying. She was advised to make a written complaint. She outlined the behaviour pattern involved. The respondent had information as to what was going on. The respondent had an obligation to take action. While it was appreciated that there were various issues it was not reasonable that six months should pass while waiting for an investigation to proceed. There were five letters between late July 2007 and the claimant's resignation but the respondent did not even acknowledge the claimant's complaint. The claimant's counsellor believed that the delay was unreasonable and that it caused further injury. No employee should be expected to return to work when no investigation has happened. The respondent failed to protect the claimant's rights. It was submitted that it was reasonable for the claimant to resign and that she was entitled to relief from the Tribunal.

In response, the respondent's representative acknowledged that, since joining the respondent in February 2006, the claimant had had a number of workplace difficulties with colleagues. These were dealt with using internal workplace mechanisms to find solutions which would allow her and her colleagues to work alongside each other. The claimant had stated in evidence that workplace relations were tense but that all parties had remained civil towards each other. It was evident that an uneasy truce had existed and that matters again came to a head in July 2007. The claimant formally lodged a complaint of bullying in July 2007 and went out ill with stress. The respondent tried to handle the matter in a sensitive fashion taking account of the claimant's illness and the need to afford natural justice to any employee against whom the claimant had made an allegation.

The respondent had a bullying and harassment procedure for dealing with such allegations and it resolved that this procedure would be used to deal with the bullying allegation. A copy of this procedure was contained in the book of evidence furnished to the Tribunal. The first part of this procedure was the investigation of the claim and involved a thorough interview with the complainant to ascertain the facts behind the complaint.

It was submitted that the claimant had obstructed the investigation by not being available to meet the person nominated by the respondent to carry out the investigation and that she, despite many opportunities, did not fully comply with the respondent's bullying and harassment procedure or indeed use internal disputes and grievance procedure to resolve this difficulty. It was also noteworthy that the claimant received trade union advice from an official and local representative who advised her not to resign but to use internal procedures to resolve her issues. It was submitted that the claimant could not claim constructive dismissal without fully exhausting the internal procedures available to her.

Determination:

The Tribunal considered the question of whether the claimant had resigned prematurely without letting the process develop. Meetings took place but the respondent did not formally acknowledge the claimant's complaint. Many issues were resolved but not all of them. It was not in the claimant's favour that a trade union representative had advised her not to resign. This militated against her resignation being deemed to have been reasonable.

The Tribunal did note a significant time delay and some negligence on the part of the respondent in its unreasonable management of the situation. The respondent should have taken a more authoritative role. That would have alleviated the need for a formal investigation. The respondent probably should have sent a letter telling the claimant by whom she was to be interviewed about her allegation and saying that the respondent would progress the matter when the claimant would feel up to it.

There was some fault on both sides but the balance was against the claimant. The ultimate decision to resign was a step too far. The respondent did allow the delay in investigating to continue but it was reasonable for the respondent to assume that the claimant was not in a position to deal with an investigation while out sick. She put the respondent on notice on 18 January 2008 that she was in a position to deal with an investigation but resigned by letter dated 11 February 2008. The Tribunal has to decide if this interval was reasonable.

The Tribunal has to accept that the process of the complaint could have been dealt with in a more expeditious manner with respect to the formal bullying allegation made. However, the Tribunal

feels that the claimant resigned before the respondent could instigate the formal investigation having been put on notice that the claimant was in a position to deal with it. The Tribunal agrees with the respondent that somebody cannot be forced into a bullying investigation while out sick but it could have happened from 18 January onwards.

The respondent could have acted more expeditiously but, once the claimant put the respondent on notice that she could deal with an investigation, she did not give the respondent adequate time to proceed with the formal investigation bring it to a conclusion.

Therefore, the Tribunal unanimously finds that the constructive dismissal claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)