

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*

UD404/2006

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. F. Moloney
Mr. S. O'Donnell

heard this claim at Dublin on 10th February 2009
and 8th September 2009

Representation:

Claimant: Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

Respondent: Mr. Tom Mallon B.L. instructed by Mr. Barry Reynolds, Arthur Cox,
Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

Claimant's case:

In her sworn evidence, the claimant explained that she commenced employment with the respondent on 24 June 2002 in marketing but subsequently became a sales representative. In February/March 2005, she moved to PA renewals, which involved taking care of customers who had purchased the respondent's license. The claimant had a number of accounts which she was responsible for, one of which was an account from a French company (*hereinafter referred to as the L account*). She had been asked rather than instructed to take care of this account. The claimant took responsibility for this account because she saw it as a good move. Colleagues laughed at her because they had refused to take this account.

In the main, the claimant dealt with the supervisor (*hereinafter referred to as FS*) of the L account. The claimant found FS to be rude and demanding. He would telephone the claimant asking for quotations and he always wanted an immediate answer. He would telephone for quotations in advance of the next quarter and he would ask for information over and over. On one occasion, FS sought a specific quotation which the claimant was not allowed to divulge. Because the claimant would not give FS the information, he called her useless, inefficient and said that she did not know how to do her job. His tone was not pleasant and he spoke like this to the claimant on several occasions.

Because of the behaviour of FS, on 14 June 2005, the claimant complained to her line manager (*hereinafter referred to as PB*). She was crying and felt abused and PB listened to what she had to say. The claimant told PB that if FS was unhappy with her, he should talk to her manager. PB said that the matter should be left with him.

Two or three days later, PB reverted to the claimant and said the L account was a big customer for the respondent and that they had privileges. PB had listened to both sides, the L account with its reason and the claimant with her emotion. The claimant had been crying that day also because she was very upset. When PB said that the L account was a valued customer and that sometimes people speak with a tone and it was part of the claimant's job, the claimant understood that PB was basically saying that she was emotional and needed coaching on how to deal with such customers.

The claimant's reaction to this had been that the issue was not about coaching but about FS being abusive. However, PB told her that she should listen to him because he was her manager. PB became mad and came at the claimant so she told him that he was the one who needed coaching. Because the situation was getting too heated, the claimant went and sat at her desk in the open plan office. She was sitting near two colleagues and was shaking. The two colleagues witnessed her shaking. PB came over to her and said "my desk" but the claimant replied "no". PB became insistent that the claimant go to his desk and she finally said that she would go but only if accompanied by her second line manager and PB's superior (*hereinafter referred to as DT*)

It was PB, the claimant and KB who returned to PB's office. Much the same was said again as had been said previously. PB told the claimant that he did not appreciate her show, that it was not a dialogue and that he was the one doing the talking. PB did not want the claimant to talk and KB was only present as a witness and did not say anything. There was no change in things after this meeting.

Following this meeting, colleagues told the claimant that she should contact the H.R. department and also go and meet DT. On meeting DT, the claimant learned that she was aware of the situation as she had already spoken to PB. DT explained to the claimant that what had happened between her and PB was because managers were under pressure and that it had not been personal. DT listened to the claimant and replied that basically, she - the claimant - would have to make things work. The claimant supposed that by this, DT meant, "make it work or leave". The meeting with DT had ended on a sour note. DT had said that she had understood from PB that the claimant had an attitude.

PB met the claimant again following her meeting with DT. He explained to the claimant that he had a temper and that both of them needed to work together. The claimant asked PB to take the L account from her as she had only taken it on as a favour.

During the first two weeks of July 2005, the claimant was on sick leave. PB contacted the claimant

on a number of occasions while she was out, the first time to inform her about the respondent's sick leave policy, the second time to tell her not to leave the country and the third time to find out when she would be returning to work. The claimant returned to work in the third week of July. The policy of the respondent required the claimant to undergo a medical assessment to certify her fitness to return to work. The nurse at the medical centre who conducted the medical assessment was very good to the claimant and the claimant spoke openly to the nurse. The nurse listened and took notes. She showed the claimant a filing cabinet which contained stress related complaints and she gave the claimant contact details for a counsellor on stress.

At that stage, the claimant returned to work. She found that she was still dealing with the L account and the behaviour of FS remained the same. One day during the third week of July, FS telephoned and was abusive to the claimant. The abuse was overheard by three of the claimant's colleagues. They said that the abuse had to stop and one of them went to the office of PB to complain. As if by magic, the L account disappeared and the claimant was free of it. It was one of the claimant's colleagues who told her about this.

Her next port of call for the claimant was to contact the H.R. department and speak to M. This was at the end of August 2005. (The H.R. department was based in Bratislava). The claimant was advised to speak to her second line manager. By this stage DT had left employment with the respondent and had been replaced by DMc.

On 4 November, the claimant was on annual leave. When she returned to work, she found an email which was looking for a quote. In the email, PB had replied that he would take care of the query and that he was unhappy with the work of the claimant. This email had been circulated to other people within the respondent company.

On 15 December, the claimant decided to activate the respondent's open door policy of being able to go to any manager. She went to DMc. Another manager was present at the meeting and took notes. The claimant told DMc that she was unable to cope with the pressure that she was under and that she had tried her best but that the pressure was unbearable. She also spoke about the L account, that she had been unable to talk to PB, that what she had said to him had been badly interpreted, that her complaints had not been investigated and that nothing was in place. This meeting lasted for an hour and a half. At the end of the meeting, DMc had asked that matters be left with her and that she would revert back to the claimant. However, DMc never came back to the claimant despite the claimant trying to contact her on the telephone.

By way of letter dated 11 January 2006 from DMc, the claimant was invited to a disciplinary meeting, which was scheduled for 18 January 2006 at 2.00pm. The claimant responded to same and informed DMc that as she was on sick leave, she would be unable to attend the disciplinary hearing. A second letter of 19 January 2006 informed the claimant that the disciplinary meeting was rescheduled for 25 January 2006 at 2.00pm and that if she failed to attend this meeting, it would proceed in her absence. This letter also informed the claimant that her salary was being withheld until further review and that her complaints were being investigated. However, the claimant never received feedback in relation to her complaints.

The claimant did not attend the disciplinary meeting of 25 January and in letter dated 1 February 2006, she was informed of the outcome of same, where she received her first written warning. On 10 February 2006, the claimant resigned.

By way of letter dated 1 March 2006, the claimant was informed of a complaint of harassment,

bullying and inappropriate behaviour that had been made against her by PB on 15 December 2005. Despite being in receipt of the previous letters which had informed her of two scheduled disciplinary hearing, the withholding of her salary, the ongoing investigation of her complaints and the outcome of the second disciplinary hearing, the letter of 1 March was the first notification the claimant received that PB had made a complaint against her.

In cross-examination the claimant agreed that she applied for five weeks holidays even though she was due only four weeks and was due to return to work on 5 December 2005 but did not return. She also agreed that she had been told by management not to take the extra week. She did not recall her targets being reviewed and being spoken to in respect of failure to give feedback by PB in or around 13 December after she had returned from holidays. She said PB was racist. The claimant did not appeal the written warning dated 1 February 2006 and subsequently tendered her resignation in writing.

In answer to questions from Tribunal members in respect of the extra weeks holidays, the claimant stated that she booked her flight to attend a course in personal development in California, which was five weeks in duration and agreed that she was wrong to make the flight booking before applying for the holidays. She had no recollection of verbal warnings.

Respondent's case:

The Tribunal heard evidence from PB who had worked with the respondent since January 1999. He joined the claimant's team as manager at the end of May 2005 and while he may have spoken to her he had no direct involvement. He had not experience of the L account and was not told it was problematic. The claimant was assigned as the focal point for the L account and she was the main contact point for the distributor. On 19 May 2005 there was a written complaint in respect of the claimant from one of the respondent's personnel in France. This complaint concerned the L account. The claimant responded by email directly to L account personnel in mid June 2005. Witness became aware of the emails and the L account personnel subsequently complained about the claimant's email. The claimant came to witnesses' office and she had an argument on the phone with a member of the L account personnel. On 14 June 2005 witness spoke to L account personnel who was not happy with the claimant being the focal point in handling the L account.

Witness met with the claimant on 14 June 2005 and told her of the concerns from L account personnel. He also went through the emails and advised her to take the benefit of coaching. The claimant declined and stated that witness was not defending her as manager but taking the side of the L account personnel. A short time later he asked the claimant back to his office and she refused. The claimant was absent on sick leave for two weeks in July and when he received a note on 1 July stating she would be out for a good part of July he asked KB to look after the L account.

Emails were received from the respondent's office in France looking for feedback, which was not completed by the claimant prior to her going on holidays in December 2005. On her return from holidays witness met the claimant on 13 December 2005 and spoke to her regarding her targets for the quarter and he also asked why she did not give the feedback to KB prior to the holidays. The claimant stated that she had given the feedback to KB before the holidays. The claimant told witness he was not being professional and referred to him in an insulting way. Witness was very offended. She called witness later that afternoon to say she went to her doctor and had got a medical certificate. The claimant did not return to work after that. In relation to the claimant's allegation of bullying witness stated that he was fair to all employees on his team.

In cross-examination witness stated that he had been told by the L account personnel that the respondent was not seen as a business priority. He did not shout at the claimant when they met on 14th June. He raised his voice as it was obvious she was not listening to him. He pointed to his office but did not gesture as described by the claimant. He came to no conclusion in relation to the complaints the claimant had in respect of FS.

The Tribunal also heard evidence from DMc who is a senior manager with the respondent and PB reported to her. She was made aware of the claimant's request for the five weeks holidays. Taking this amount of leave together was going to cause difficulties based on business considerations. The claimant asked witness to meet her in relation to an incident with PB and this meeting took place on 15 December 2005. The claimant went through all the events and witness spoke of the holidays and the impact it had on the respondent. The claimant had also requested an investigation under the respondent's harassment, bullying and inappropriate policy. The claimant outlined these allegations verbally. The claimant stated that she had been verbally abused by FS. She also cited ongoing bullying and harassment directed towards her by PB during the previous six months. The key allegations referred to were documented and outlined to the Tribunal. Other individuals were also mentioned by the claimant and they were interviewed by witness. Following the interviews/investigation witness came to the conclusion that the allegations were unfounded.

A report on the investigation of the bullying and harassment allegations was issued in May 2006. It took some time to issue this report as witness wanted to ensure a fair assessment. The claimant was told of her right to appeal this decision within ten working days. The claimant was invited to a disciplinary hearing to be held on 18 January 2006. On the claimant's request this meeting was re-scheduled for 25 January and she had been told that if she failed to attend, the meeting would proceed in her absence. The claimant did not attend as requested and the meeting took place in her absence. By letter dated 1 February 2006 the claimant was issued with a first written warning which was to remain on her personnel file for nine months. The claimant was told of her right of appeal of this warning within ten days. On 15 December 2005 PB made an allegation of harassment, bullying and inappropriate behaviour against the claimant. Written notification of the allegation, dated 1 March 2006 was sent to the claimant and witness felt she could have told her verbally on 15 December 2005. There was no valid reason for the claimant's resignation on 10 February 2006. Witness felt she dealt with the claimant in accordance with procedures.

In cross-examination witness stated that when she wrote to the claimant on 11 January 2006 she knew she was out sick at that time. The respondent had not received social welfare cheques from the claimant and she had failed to attend the first meeting. She sought guidance from the company doctor in relation to the issuing of this letter. On 26 January 2006 the claimant was invited to a performance assessment meeting and while the respondent was aware that the claimant was sick they wanted to give her the same opportunity as the other staff and the system closed on 31 January.

Determination:

The Tribunal considered all of the evidence adduced. It notes that while the respondent took until May 2006 to complete its investigation into the complaints made by the claimant on 15 December 2005 that they gave evidence that this was because the respondent wished to give a fair assessment to the claimant and further notes that this explanation was not disputed by the claimant.

The onus is on the claimant to establish that the respondent behaved towards her in such an unfair and unreasonable manner so as to leave her with no option other than to leave her employment. While it is accepted that both tensions and difficulties did arise between her and the respondent in the course of her employment the Tribunal is of the view that these were not of sufficient consequence so as to entitle the claimant to resign and claim that she was unfairly dismissed. It therefore follows that the claimant has failed to discharge the onus placed on her and that her claim of constructive dismissal fails and that she was not unfairly dismissed under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)