

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE - claimant

CASE NO.  
UD1441/2008

against  
EMPLOYER - respondent

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms N O'Carroll-Kelly BL

Members: Mr R Murphy  
Mr A Butler

heard this claim at Dublin on 14th July 2009 and 5th November 2009

Representation:

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Claimant(s): Mr Donal O'Muircheartaigh BL, instructed by:  
Mr Donnacha Hennessy,  
Gerard O'Brien, Solicitors,  
2 Thomond Road, Thurles, Co. Tipperary

Respondent(s): Mr. Tim O'Connell  
IBEC,  
Confederation House,  
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant contended that she was constructively dismissed from the respondent company. The claimant commenced her employment as a security guard in 1996. The claimant suffers from Irritable Bowel Syndrome (IBS) and the company had always attempted to accommodate her with sites that had a toilet available, until towards the end of her employment in October 2008. Throughout her employment the claimant worked day shifts on sites that had a team of security guards. She never worked alone or at night.

After the death of the claimant's parents, two years before her employment finished, the claimant's IBS worsened and led to an increase in sick leave absences. The claimant was working on the

Hewlett Packard (HP) site, but there were cuts in staff and posts and there was only one post left that had toilet facilities. The claimant then requested to go to the Wyeth site, which had suitable facilities. The company knew why the claimant had requested the move and had suggested the site to her.

In April 2008, the claimant contracted a viral infection and was on sick leave for a week. The claimant received a message to meet the Personnel Director for a chat. The claimant was worried because of her sick leave and kept the message. The Personnel Director had the claimant's file on the desk and said it was huge. He wanted something to be done about the claimant's sick leave. The Personnel Director suggested that the claimant take six weeks off work to see if work was causing her illness. The claimant said she would visit her doctor. The claimant walked out of that meeting.

The claimant's doctor told her that there was no point in taking time off, as her illness was intermittent. The claimant rang the Personnel Director to tell him and asked to return to work, he said he would contact her. The claimant phoned again and the Personnel Director said the claimant could return to the HP site. The claimant said she couldn't return to the HP site as the toilet facilities were unsuitable but the Personnel Director said she would have to. The claimant panicked that night and rang the Personnel Director to accept the offer of six weeks off.

During her time off the claimant heard that the HP site was being taken over by a different security company. Towards the end of the six weeks the claimant rang to find out about returning. The Personnel Director told her that her position was gone and that he believed that she was looking for other work. The claimant said she would contact her solicitor. The claimant wanted to resume work in Wyeth and was believed there was a vacancy there, due to sick leave.

The claimant brought a colleague to the meeting on 5<sup>th</sup> June 2008 with the Personnel Director and Operations Manager. The Personnel Director stated that the claimant had sought the six weeks off to seek other employment, which the claimant denied. The meeting was tense and the claimant felt intimidated. They kept saying that the claimant's file was the biggest in the company. The Personnel Director said there was no position available for the claimant but that he would look into it.

The claimant visited the company doctor the following day and was certified fit for work. The claimant contacted the company, but was told that the Operations Manager would be in touch on his return from holidays. The claimant was paid during this period.

The claimant had a further meeting on 18<sup>th</sup> June 2008 with the Financial Director and the Operations Manager. She brought the same colleague with her. The claimant felt intimidated when The Financial Director said that he was the company solicitor. He said there was nowhere to put the claimant but that he would juggle things around and put the claimant on night shifts on her own. The claimant asked to be made redundant, but the Financial Director said the company didn't do that. The claimant believed that an offer of nights at the Wyeth site was off the table.

The claimant viewed three sites that were possible locations for night shifts. When viewing the National Stud with the Financial Director he congratulated the security guard on duty for apprehending intruders and for putting out a barn fire. The claimant believed that the Financial Director was trying to intimidate her. The claimant's doctor advised her not to do night shifts, as being on her own at night and without proper toilet facilities would aggravate her IBS.

The claimant attended a further meeting with her Trade Union representative on the 8<sup>th</sup> July 2008 and gave verbal notice of her intention to leave. The claimant gave her notice on the 7<sup>th</sup> October 2008. The claimant's IBS had worsened since leaving and she has been on disability benefit since leaving.

During cross-examination the claimant agreed that her contract allowed for changes to her hours and place of work. She was aware of the company's grievance procedure. The claimant hadn't invoked the grievance procedure in writing, but had gone to her trade union representative. The claimant agreed that the company had paid for visits to a psychotherapist in relation to her condition. The claimant could not recall if her trade union representative had told her to resume work on nights and move to days when possible.

An employee of the company gave evidence that he attended two meetings as a witness with the claimant on the 5<sup>th</sup> and 18<sup>th</sup> June 2008. At the first meeting were the Operations Manager and the Personnel Director, from the company, the claimant and the witness. The Operations Manager said that the meeting should be friendly and informal, but the atmosphere turned hostile with references to the claimant's sick leave. The Personnel Director contended that the claimant had sought the 6 weeks off. The witness said that the claimant's sick leave was certified, but the Operations Manager tapped the file and said that was what it was all about. The claimant said that they were trying to get rid of her, but the Operations Manager said that if they wanted to do that they would have done it years ago.

According to the witness the Operations Manager's temperament was fine, but that the Personnel Director got aggressive when the claimant insisted that she had not sought the six weeks off, and he told her to stop pointing her finger. The Operations Manager said that she was only making a point. The Personnel Director then closed his notebook and stared at the claimant for ten minutes. He walked out at the end of the meeting, but the Operations Manager shook hands.

The witness attended the next meeting with the claimant, the Financial Director and the Operations Manager. The claimant didn't like that the Financial Director introduced himself as the company solicitor, and when he mentioned it again the witness said if he said it again the claimant would have to get legal representation. The witness asked why the claimant had been removed from the Wyeth site and the Financial Director said that if a client requests that someone is removed then the company has to act. The witness had never heard of that before.

The Financial Director said there were four sites available; Tegral, The National Stud, Crown and a different Wyeth site. All were single person night shifts. The witness went to two of the sites with the claimant. The Wyeth site was then removed as an option. The witness believed that the company was trying to get rid of the claimant.

During cross-examination the witness confirmed that it was the Operations Manager and not the Personnel Director, as the claimant had said, who tapped the file. The witness was unaware previously what the Financial Director's title was. The witness agreed that he had never worked on the Wyeth site. He confirmed that the second meeting had ended reasonably. He contended that at the second meeting the Financial Director had said that there was no position for the claimant in the company and when the witness suggested that it was a redundancy situation he said the company didn't do that. The witness had never heard of a female staff member working alone on night shifts.

## Respondent's Case:

The Personnel Director gave evidence that he met the claimant on the Wyeth site and she said that she was unhappy there. The claimant felt that she was being singled out, as she was the last person in, and that she had no one to talk to. The next day the Personnel Director got a call to say that the claimant was sick. He was concerned that the claimant's illness was due to her unhappiness at the site she was on, so he called her to come in for an informal meeting on her return, the 28<sup>th</sup> April 2008.

The claimant's parents had died in the recent past and she had said several times previously that her head was not right and that she was in financial difficulties. He suggested that she take some time off, but did not specify the length of time. The claimant said that she was considering seeing a psychiatrist and the Personnel Director said he would make representations to have it paid for by the sick pay scheme. He received sanction for two visits, which the claimant attended. The claimant also suggested that she might look for something different in the meantime.

The claimant initiated the next meeting a month later when she asked about moving to the HP site. The Personnel Director had offered that at the previous meeting, but the claimant had turned it down and the position was no longer available.

At the meeting on the 5<sup>th</sup> June 2008 the claimant seemed to begrudge being there. The claimant brought a colleague to the meeting. The claimant was still on sick leave and the Operations Manager suggested possible positions for her on her return. The Operations Manager said they would arrange for the claimant to visit the company doctor prior to her return. She was obviously unhappy at the Wyeth site and so that was not an option.

The Personnel Director disputed that he had tapped the file and pointed at the claimant. He contended that it was not in his nature to be aggressive and that he had a good relationship with the staff. The claimant asked if they were trying to get rid of her and he said of course they weren't. There are currently twelve female employees in the company with two working nights. One female employee worked alone on nights at the National Stud for six years. The claimant wasn't offered redundancy as the company operates a last in first out policy and because there were positions available.

During cross-examination the witness confirmed the four sites available and contended that the Wyeth site was not withdrawn and was still available for the claimant to visit, but she didn't. He stated that there were no females on fulltime night shifts alone in the last six years.

The Personnel Director confirmed that the claimant had never received any official warnings. She had a condition, which the company accommodated. He contended that the claimant's file was not with them at the second meeting. It was with them at the third meeting. He learned of the claimant's decision to resign when he received her resignation letter by fax. He contended that the sites offered to the claimant were to facilitate her, they had toilet facilities and nights were quieter.

The next witness for the respondent was the Financial Director, and is also a qualified solicitor. His father founded the company 50 years ago. He disputed that he introduced himself as a solicitor at the meeting of the 18<sup>th</sup> June. The claimant brought her partner to the meeting and he said that he was the company solicitor and that the employee handbook did not allow for family members to

attend such meetings.

The meeting was to discuss the outcome of the claimant's visit to the company doctor, whether she was fit to return to work and to discuss the four sites on offer. He agreed that he said he would juggle staff to find a place for the claimant, as was necessary with a roster of approximately 100 employees.

Redundancy was not an option for the claimant as the company has a SIPTU agreement, which stipulates LIFO ('last in first out') as the selection process.

The witness visited the National Stud with the claimant, arriving at approximately 6pm. They did a tour of the grounds and left the claimant with the security officer on duty to see the day to day running. He contended that the sites were selected for the claimant with the required facilities in mind. He contended that the National Stud is a world class facility and that the security cabin is not 'on the side of the road'.

The witness disputed that he was trying to intimidate the claimant by discussing intruders at the site the previous night. The guard had notified the Gardaí of intruders and they had arrived minutes later. The witness was there to give the guard an employee of the month award.

At the meeting with the claimant and her SIPTU representative, on 8<sup>th</sup> July 2008, the representative sought clarification on issues and he discussed these with the claimant. The witness confirmed that the Wyeth, Newbridge site was still available and that the claimant could move to day shifts when available. The meeting then broke down and the claimant left, the witness didn't know why.

During cross-examination the witness agreed that he could have asked the claimant's partner to leave without saying he was a solicitor, but contended he was just pointing out company policy from a legal point of view. He explained that the company now has only three sites which require day staff. The witness explained that twelve employees had moved from days to nights in the last year.

He contended that the Tegral site had a newly built security hut with toilet facilities and that the work mainly consisted of checking trucks going in and out of the site. He said that HP had not requested that the claimant be removed from their site.

The witness learned of the claimant's resignation by fax in October, the day her paid sick leave ran out. He contended that the process of meetings with the claimant was not a disciplinary process but was only to try and resolve the situation.

The final witness for the respondent, the Operations Manager, gave evidence that he attended the meeting with the Personnel Director on 5<sup>th</sup> June 2008. He stated that in his previous job he had been involved with the union and he wanted to see the situation resolved. He had no recollection of anyone tapping the file or of reprimanding the Personnel Director. There was a dispute about what was agreed at the previous meeting but that was resolved.

At the meeting on 18<sup>th</sup> June 2008 the sites were identified and visits arranged. The witness met the claimant at the Tegral site. He contended that the facilities were very good at the site. The security hut was equipped with toilet facilities, heating, microwave and fridge. Likewise the facilities at the National Stud were very good and the job mainly involved driving. When the witness went to the National Stud the day after their visit he was told that the claimant had left immediately after them

and had not stayed to see how the site was run.

The meeting of the 8<sup>th</sup> July 2008 was arranged was to reach an agreement on the sites available for the claimant. The claimant was supposed to revert to the witness through her union representative after the meeting, but that evening the company received a fax from the claimant's legal representative which brought a stop to that process.

During cross-examination the Operations Manager contended that the company have a lot of staff working alone on nights and that they have back-up through the local Gardaí and a call-in system every 1½ hours. The witness learned of the claimant's resignation via the fax she sent. He had no further contact with her. The claimant took 26 weeks of paid sick leave and then resigned.

Determination:

The claimant is alleging she was constructively dismissed from her employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

*“The termination by the employee of his contract of employment with this employer whether prior notice of the termination was or was not given to the employer in the 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 contract of employment without giving prior notice of the termination to the employer”.*

The burden of proof, which is a very high one, lies with the claimant. She must show that her resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the Tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the Tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to terminate the contract was a reasonable one.

The Tribunal is satisfied based on the evidence of both the claimant and the respondent's witnesses that the claimant was offered four alternative positions on the Crown site, the HP site, the Tegral site and on the National Stud site, and for the claimant's own personal reasons she decided not to take up any of these options. The Tribunal is satisfied that all of these sites had adequate toilet and security facilities which met the claimant's fears. The claimant had an issue with working on her own at night time, however, the respondent did give her assurances that when a day time position became available it would be given to her. Had the claimant not resigned she would have been able to avail of the day shifts at the Tegral site, which started soon after her resignation.

The claimant argued that her contract of employment stated that she would be given four shifts a week and they would be daytime shifts. That is correct, however her contract also stated at 3.3 that, “Your duties may be altered from time to time” and at 4.2, “ you may be required to work days and nights or such shift rotations as may be designed from time to time”.

The respondent had a grievance procedure of which the claimant was fully aware. The claimant stated in evidence that she did not lodge a complaint. No specific evidence was given as to why she did not invoke the grievance procedure.

It is not for the Tribunal to say whether using the grievance procedure would have brought about a favourable result for the claimant. Equally it is not for the Tribunal to try and establish what the result might have been. The only matter the Tribunal must concern itself with is whether or not the grievance procedure was invoked. It is a well established Tribunal precedent that there is an obligation on the claimant to use that avenue to try and resolve issues prior to taking the final step of terminating her employment. The only exception is where there is proof of bias or unfairness justifying the decision not to invoke it. The Tribunal is satisfied that there was no evidence of bias or unfairness.

The Tribunal is satisfied that the respondent did everything it could to meet the claimant's demands, that there was no breach, significant or otherwise, of the terms of the claimant's contract and that her decision to resign prior to exhausting the grievance procedure was not a reasonable one. The claimant's claim must in law fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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