

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1290/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr B Kealy
Mr G Lamon

heard this appeal at Naas on 6th May and 13th October 2009

Representation:

Claimant: Mr Matthew Byrne, Burns Nowlan Solicitors,
31 Main Street, Newbridge, Co. Kildare

Respondent: Mr Conor O'Toole, Coughlan White O'Toole Solicitors,
Moorefield Road, Newbridge, Co. Kildare

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute and therefore it was for the claimant to make her case first.

The respondent had employed the claimant as a receptionist from 22nd March 2007. The respondent operated an employment agency. In addition to performing the normal duties of a receptionist the claimant was to identify candidates from amongst those held on file for the purpose of filling vacancies as required by the respondent's clients. The claimant's role also included informing the candidates of their placement and checking their availability. These tasks were often carried out at short notice. The employment was uneventful until around 8.00pm Friday 29th

August 2008 when the managing director of the respondent had attempted to contact both the claimant and the branch manager by telephone. The branch manager was the immediate line manager of the claimant. The managing director had wished to gain their assistance in identifying candidates for a new client. The new client ran a large logistics operation and was potentially an important source of business. The new client had notified the managing director that it needed to fill twelve vacancies for a shift commencing later on that night. The claimant did not have her mobile phone with her when the managing director rang and so he could not make contact with her immediately but he sent her a text message. When the claimant got to her mobile at around 9.00pm she read the text message and chose to ignore it. On Monday 1st September 2008 the managing director, who had been dissatisfied with the performance of the

claimant on 29th August 2008, made this known to her at the beginning of that working day. The claimant's position is that the managing director's attitude towards her changed from that point.

On 5th September 2008 the claimant was involved in the identification and supply of a candidate for this same new client who had made the request on 29th August 2008. On this occasion the placement was to commence on Monday morning 8th September 2008. The candidate did not turn up and the new client complained to the managing director. The managing director was unhappy with the performance of both the claimant and the branch manager in this regard as he was not satisfied that voice contact had been made with the candidate. The claimant's position is that she had made voice contact. The respondent's position is that contact was only made by text to which there was no reply. The managing director indicated his dissatisfaction to both ladies shortly after 9.00am and then left the office. The respondent's position is that this was the second time in a week that he had been dissatisfied with the claimant's performance and that he intended to take further action. At 10.07am the claimant sent an email to the managing director stating,

"I would like to have important meeting with You today as I am very upset how I've been trited by You in front of my coullegues. This is important".

The managing director replied at 2.45pm stating,

"I would like you to attend a meeting with the financial controller and I on Thursday 11th September at 5.00pm to discuss your issue below and also to discuss your current employment performance. As this meeting is to discuss your performance, which may result in disciplinary action, you are recommended to attend this meeting with another person."

The claimant replied on 9th September 2008 at 11.35am stating,

"Thank You for appointment on Thursday. However As to discuss my treatment by you as my employer as following procedure of Handbook of Company. I understand You may want to discuss performance but meeting I requestes is regarding Grievance. I am happy to attend a performance meeting at another date but for meeting a requestes it is a different matter as you are aware from my e-mail."

The claimant then consulted her legal representative in the presence of the branch manager and on 10th September 2008 her solicitor sent a letter to the managing director in which the claimant complained of being the subject of bullying and harassment from the managing director in recent times and being subjected to constant humiliation, ridicule and belittling in front of work colleagues. The letter went on to point out that the claimant was suffering from stress and may be suffering from depression and indicated possible claims under both the Unfair Dismissals and the Employment Equality Acts

On 11th September 2008 at 11.16am the managing director replied to the 11.35 e-mail of 9th September stating,

"I am happy to facilitate a meeting with you on your grievance, as per our Company Handbook. As you have stated that you grievance is with me personally, then it would not be suitable that your grievance meeting is with me. I have asked the branch manager to meet with you tomorrow, Friday 12th September, at 12.30pm for an informal meeting, as per our handbook.

Please ensure you are available for this meeting."

The claimant replied at 11.38am stating,

“Is meeting cancelled today as per your e-mail I have organised some one to attend meeting with me. Have you also decided when you want to do performance meeting previous e-mail I can meet the branch manager tomorrow.”

The managing director replied at 11.51am

“Meeting today is cancelled and replaced by your meeting with the branch manager tomorrow. As per our Company Handbook, you are welcome to attend this meeting with a colleague or friend.

I will be arranging your performance meeting for a future date.”

The financial controller, who also acted as the human resource manager, went on maternity leave on 12th September 2008 and the branch manager stepped into this role to handle the claimant’s grievance.

The claimant met the branch manager in a one to one meeting on 12th September 2008 and at this meeting the claimant raised the issues complained of in the letter of 10th September 2008. A grievance meeting was then held on 15th September 2008 attended by the claimant, the branch manager and the managing director.

On 16th September 2008 the claimant sent an e-mail to the managing director stating

“A meeting is to take place on Wensday 17th September 2008

I would like to know:

- 1. I want to be legal representative in this meeting, unless that can be agreed I would ask that meeting put off.*

Becouse Yesterday When mediator (as was the branch manager) transfer me that you demand (that was around 4 o’clock) secondary meeting

I have asked about person which can representative me because I have heard that meeting at 4 o’clock with You will be heavy for me because you are very angry.

- 2. So. I ask for somebody who will be with me on this meeting, As I will feel safely in my presence fond legal representative.*

The claimant was on sick leave for two weeks from 16th September 2008 with a medical certificate giving anxiety and stress as the reason for her absence. The claimant did not attend work after this time.

The branch manager sent a letter outlining her view of both the 12th and the 15th September meetings to the claimant on 25th September 2008. The letter described the claimant as having been concerned about her job security and being stressed when having to deal with the managing director directly. In relation to the 15th September 2008 meeting the branch manager stated that:

- The managing director confirmed the claimant's position was secure as long as acceptable performance levels were maintained.
- In recognition of the claimant feeling stressed in the managing director's presence the managing director had agreed he would do his best to make the claimant more at ease in his presence.
- Despite feeling that he had always treated the claimant with respect he apologised if this was not the case. It was agreed that both parties take steps to improve communication between them.
- In order to improve communication a monthly performance meeting was agreed.
- The claimant was much happier at the end of the meeting and felt that she could approach the managing director about any further issues, which may arise.

The claimant's solicitor wrote to the managing director on 29th September 2008 with a list of four complaints against the respondent:

- Being asked by the managing director to clean his house on 29th November 2007 as the cleaner organised had gone elsewhere.
- Being told when taking holidays in January 2008 by the managing director that she would have to train her replacement very well and if the replacement was good the replacement would be kept in place of the claimant.
- Being made fun of by the managing director on 15th August 2008 in regard to a candidate who had referred to himself as a "pedagogist" in his CV.
- Issues set out in previous correspondence.

This letter also notified the respondent that the claimant was leaving her employment by way of a constructive dismissal due to the nature of her working conditions.

It was the respondent's case that the first three allegations had been raised for the first time only in this letter and that all three allegations were denied by the respondent. In evidence to the Tribunal the claimant raised a number of other issues not canvassed in the correspondence. She complained of being ignored by the managing director and of being disrespected in the circulation of e-mails. She further complained of an incident, which had occurred when visiting a meat industry client, and the client had made disparaging remarks about her needing to work in an abattoir to change her attitude.

Determination:

The Tribunal finds that the respondent was satisfied with the performance of the claimant until 29th August 2008. The Tribunal finds that the respondent was not aware that the claimant had any problems with how she was being treated until her e-mail was received on 8th September 2008. The Tribunal finds that the managing director's response to the claimant choosing quite deliberately not to reply to his text of 29th August 2008 was natural and reasonable. It is clear, however, that this incident clouded the working relationship. There was a second incident, involving the same client, the following weekend. The Tribunal is satisfied that it was reasonable for the managing director to be unhappy about this and to contemplate disciplinary action on the morning of 8th September 2008. The Tribunal accepts the respondent's contention that in relation to the 10.07am e-mail of 8th September 2008 the claimant was "getting her retaliation in first". The claimant had never raised any suggestion of a grievance before the respondent flagged its intention to commence disciplinary action. Once the grievance was raised the respondent attempted to deal with it and delayed any disciplinary meetings until it was dealt with first. The Tribunal finds that the

respondent dealt with all of the claimant's grievances adequately and in line with the respondent's written procedures. The response of the claimant to the respondent's stated intention to commence a disciplinary procedure for the first time in the course of her employment was to raise grievances against the person who had proposed the disciplinary procedure, to go out sick claiming stress and to commence correspondence through her solicitor. The Tribunal has accepted into evidence the medical certificate of the claimant's general practitioner but the Tribunal is aware that a general practitioner in providing a medical certificate must rely on the reportage of the patient. Insofar as there were conflicts of evidence the Tribunal prefers the evidence of the managing director to that of the claimant. When the respondent communicated its response to the grievances of the claimant the claimant by way of a letter from her solicitor raised new grievances and stated that the claimant regarded the employment to be at an end and claimed constructive dismissal. The Tribunal finds that the claimant failed to afford to her employer the opportunity to deal with the new grievances prior to the termination of employment and that those which had been raised had been dealt with in a manner which the Tribunal finds satisfactory. The Tribunal notes that one of the matters complained of had allegedly occurred some ten months prior to disciplinary proceedings being threatened and it was not raised until it was mentioned in the resignation letter. An employer cannot be faulted for failing to deal with grievances of which it has no notice.

In the course of the claimant's evidence in chief the claimant asserted that she had been bullied and harassed and held up to ridicule. The Tribunal warned the representative for the claimant that the Tribunal had no intention on accepting such conclusions merely on the basis of the claimant's assertions but that the Tribunal needed to hear what had allegedly happened in sufficient detail to allow the Tribunal to exercise its own judgement as to whether the detailed account of events amounted to bullying etc. Despite this warning the claimant was not led to give evidence in sufficient detail to allow the Tribunal to form conclusions favourable to the claimant on the ultimate issues. The cross-examination had not long commenced for it to become obvious that the respondent did not intend to draw out detail of these matters and the Tribunal accepts that the respondent is under no obligation to bring out in evidence from the claimant evidence that could provide a *prima facie* basis for the claimant's allegations. The Tribunal is described in the legislation as a "less formal" tribunal. It has long been the view of the Tribunal that it has an inquisitorial role and indeed it can be reasonably argued that the exercise of an inquisitorial role is essential to ensure that all necessary evidence to a party's case is adduced in circumstances where it appears that there has been a failure to call sufficient evidence to make out a claim for reasons not limited to but in some cases including a lack of representation.

Having inquired as to the detail of the allegations of harassment the Tribunal finds that the managing director no way bullied or harassed the claimant or held her up to ridicule. One of the allegations against the managing director is that he sent an e-mail informing the staff of important changes in the workplace and that the others had been cc'd the e-mail and that only the claimant had been bcc'd this e-mail; the Tribunal does not comprehend any great wrong in this alleged slight. Another allegation was that she described a person as a "pedagogist" in a document which was to be sent to a client and the managing director had asked her what this meant and she said that it meant the person was a teacher and then her employer laughed. "Pedagogist" is not a word in the English language and even pedagogue is not appropriate to use in circumstances where that non-Irish trained person was seeking non-teaching work. An employer is sometimes entitled to express frustration or exasperation with an employee. The Tribunal has considered all the allegations and considers no one matter or combination of matters to amount to unfair treatment by her employer. The Tribunal is not satisfied that the

treatment of the claimant by the respondent amounted to grounds for constructive dismissal. Having carefully considered all relevant matters the Tribunal dismisses the claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)