

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

MN1168/2008

UD1263/2008

WT517/2008

against

EMPLOYER - *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms B. Glynn

Members: Mr. B. O'Carroll
Mr J. Le Cumbre

heard this claim at Athlone on 8th May, 2009, 9th and 10th July, 2009

Representation:

Claimant(s) : Mr Gerry Gallagher, Fintan O'Reilly & Co, Solicitors, Suite
Five Gateway Centre, Monksland, Athlone, Co. Roscommon

Respondent(s) : Mr Michael McGrath, IBEC, Confederation House, Baggot St,
Dublin 2

The determination of the Tribunal was as follows:-

Preliminary Point

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn at the outset of the hearing.

Claimant's Case

The claimant gave direct evidence that she worked for the respondent from May 2004 until July 2008. She worked for approximately one hour per day, seven days per week in a cleaning capacity. She started work at 8.30 am and finished at 9.30am. On occasions she returned to work in the evening time which had the effect of her only having to report for work six days per week instead

of seven days per week. Her senior manager, hereafter known as CH was aware of this arrangement. She had a good relationship with her employer for over three years, she enjoyed her job, her work was praised on a number of occasions and there were no complaints from management about her work performance.

This relationship changed in September 2007 when a new branch manager, hereafter known as CE began working for the respondent. CE made her working situation extremely difficult. In January 2008 when she (the claimant) was cleaning the shop CE told her not to be on the premises while she was there. She found her manner to be very intimidating. On another occasion CE telephoned a senior manager, hereafter known as FM, complaining that the toilet had not been cleaned despite the fact that the toilet was out of order and a maintenance person was required to unblock the toilet. CE knew this and had placed a notice on the toilet door stating that it was out of order. It is the responsibility of a manager to contact maintenance division to report the toilet been out of order.

The claimant gave further evidence that her husband drove her to work. She would remain in the car until she saw CE leaving work and then report to work herself and carry out her duties. She feared meeting CE when she attended work. Prior to CE becoming the branch manager the claimant drove to work herself. CE constantly left notes complaining about things. These notes stated that if these things were not corrected she would be contacting head office. The claimant contacted two senior managers, hereafter known as CH and FM complaining about the treatment she was receiving but nothing changed. She did not recall ever receiving a grievance procedure or an employee handbook from the respondent. There was a notice placed on the wall of the shop about procedures to be followed. She telephoned the number provided on this notice but again nothing changed following this phone call. She did not put her complaints in writing as she felt her phone calls were sufficient.

Finally, on the 2 July 2008 the claimant met with the operations manager hereafter known as PK. She outlined her complaints to him but did not feel he was listening to her. She received one days notice of this meeting and was not told the purpose of the meeting. CE was in a room next to where this meeting took place and the claimant did not feel comfortable about that. The claimant tendered her resignation after that meeting as she realized that PK was not listening to her complaints. She had made genuine attempts to bring her grievances to the company's attention and stated that it would not be normal procedure to go directly to an operations manager with a grievance.

She has been unemployed since July 2008 and has attended an interview for a job in the canteen of a factory. She did not receive a reply from that interview. She has also applied for jobs minding children.

Under cross examination she confirmed that it was her responsibility to clean the staff toilet and the customer toilet. She left the premises one evening and when she reported for work the following morning the toilet was blocked. As a result of being blocked she could not clean the toilet until a maintenance person called and unblocked it. On occasions when she was out sick she never contacted head office to report her absence, she simply contacted one of the employees in the shop. She is aware that she was not supposed to be on the premises when the shop was open to customers. Prior to CE's arrival in the shop, she cleaned the shop while other employees were on the premises. She does not think it was unreasonable for a shop manager to leave notes for her concerning her work duties and the notes never requested her to do anything outside her job description. The notes from CE threatened that head office would be contacted if what was requested were not carried out. Notes were also left by another shop manager, JB but her notes were not intimidating and she had a good relationship with JB.

The witness gave further evidence that she was contacted by head office informing her that a checklist reminding her of her duties was being sent to the shop. This checklist was forwarded and she had no issues with the details on the checklist. The checklist was posted up on the shop. It was her duty to clean the staff counters in the shop. She did so every day. The counter contained piles of dockets and she could not recall if a staff handbook was on the counter. Her job was simply to clean the counter. Between July 2007 and July 2008 she contacted three district operations managers, CH, CR and FM complaining that she was being bullied and harassed by CE. She told CR that CE was the manager from hell. Prior CE's arrival in the shop her (the claimant's) brother was the manager and he expected the same standard of cleaning as CE. She does not believe that the investigation carried out by the company was carried out in a fair manner.

In reply to questions from the Tribunal she confirmed that she was never given a verbal or written warning about the standard of her work and was not aware of the existence of any grievance procedures. She confirmed that it was not part of her normal duties to unblock toilets.

The second witness gave evidence that she worked for the respondent from June 2007 until January 2008. During her time working there she had issues with CE and she brought them to the attention of a district operations manager CH. She informed him that CE was nitpicking and these issues influenced her decision to cease working for the respondent in January 2008. She witnessed the notes that were left for the claimant and they were not so nice. She also witnessed the claimant crying after CE had spoken to her.

Under cross examination she confirmed that she left the company because she was headhunted by another employer. When she raised issues with CH he was willing to deal with them and was very supportive. She confirmed that the claimant's brother is her district manager in her current employment.

In reply to questions from the Tribunal she confirmed that the notes left for the claimant never said please or thank you, and she would have taken offence if the notes had been left for her.

The third witness gave evidence that he was the claimant's husband. The incidents that his wife experienced at work affected her home life and she often broke down at home because of the treatment she was receiving in her workplace. He drove his wife to work and waited with her in the car until CE left. His wife would then go to work. His wife never had a difficulty going to work prior to CE working in the shop.

Respondent's Case

The first witness for the respondent, CH, gave evidence that he is a district operations manager and he processed the claimant's payroll from his office in Limerick. He has direct responsibility for a number of shops but has no responsibility for the shop where the claimant worked. He was contacted by the claimant on one occasion when she locked herself out of the shop one evening. He never received any complaints from the claimant regarding issues of bullying and harassment. If he had he would have contacted her district operations manager or the Human Resources department.

Under cross examination he confirmed that he was not the claimant's district operations manager but accepted that his name was on a notice board in the claimant's workplace as a district operations manager. When he was contacted by the claimant in relation to her being locked out of the shop he contacted the local guards and asked them watch over the premises on the night in

question. He felt that this was the right course of action to take. He never had any conversation with the claimant regarding any complaints she may have had.

In reply to questions from the Tribunal he confirmed that, as a district operations manager he has a role concerning disciplinary procedures in conjunction with the Human Resources department and is familiar with grievance procedures.

The second witness, CR, gave evidence that he is a shop manager. Previously he was a district operations manager and had responsibility for the shop where the claimant worked. He took on responsibility for that shop in early November 2007. He looked after the staffing in the shop. He never met the claimant. The claimant contacted him by phone on one occasion about notes that were being left in the shop for her about cleaning issues. He informed her that this was normal procedure and common practice to leave notes. This was also done in other shops. He only had two conversations with the claimant and she never raised any issues concerning bullying or harassment with him. She never said that she was going to resign. He left as district operations manager in November 2007.

Under cross examination he confirmed that his working relationship with the claimant was pleasant. She told him about the notes that were being left for her but never actually said that she was making a complaint. He sent a checklist to her shop as a result of a phone call received from the claimant. She never indicated to him that she was dissatisfied in her job. CE never made a complaint to him about the claimant's standard of work but she did say that there were one or two things not done.

In reply to questions from the Tribunal he stated that he did not perceive the claimant's phone call to him to be a complaint although it was obvious to him that she did not like the content of the notes. On an occasion when he visited the shop CE indicated to him that she was unhappy that the claimant had not cleaned the toilet on one occasion. He did not record this and no action was taken by him as he did not perceive it as a complaint. He never had any problems with the standard of cleaning in the shop on any occasion that he visited. The shop was always spotless when he visited. He has no record of the claimant's supervisor, CE ever making a complaint to him.

The next witness gave evidence that she is the Human Resources manager. She gave evidence that the company handbook deals with anti-bullying issues and this handbook is issued to employees when they commence working for the respondent. All line managers are trained in bullying and harassment procedures and district operation managers are trained to notify Human Resources department in the event of complaints being made.

Under cross examination she confirmed that the company have no record of the claimant been given a contract of employment and she could not confirm if the claimant had been given a copy of the company handbook which deals with grievance procedures.

In reply to questions from the Tribunal she stated that the company handbook is available to all employees in each individual shop. There is a standards checklist in place in each shop and it is the responsibility of the shop manager to judge if the shop is adhering to those standards. If the performance of a shop cleaner is not of the required standard it should be highlighted by the shop manager. The company has no record of any verbal warnings been given to the claimant.

The next witness, FM gave evidence that she is a district operations manager and has 25 years service with the company. She had responsibility for the store where the claimant was employed when a previous witness, CR was on holidays. In August 2007 she received a call from the claimant

stating that she was unhappy with the fact that notes were being left for her in the shop by CE. She got the impression that the claimant did not like the form of communication of notes being left for her. She asked the claimant if she wanted her (the witness) to speak with CE but the claimant replied that she did not. She did not get the impression from the conversation that the claimant was being bullied or harassed. She only had one other conversation with the claimant in February 2008 and that conversation was based around holidays.

Under cross examination she confirmed that she could not recall having a conversation about a toilet blockage but could recall receiving a call from CE about the blockage. She contacted a maintenance person as a result of the call. On another occasion she received a call from CE regarding the fact that the toilet had not been cleaned. She never received a complaint concerning the claimant being on the shop floor during opening hours. She attempted to arrange a meeting in February 2008 or March 2008 involving the claimant, CE and herself but this meeting never occurred.

In reply to questions from the Tribunal she stated that she received a total of two complaints from CE about the claimant's standard of work. The complaints related to the non-cleaning of counter tops and the non-cleaning of the customer toilet. She asked CE if she had spoken to the claimant but was not sure if she had. She did not perceive the phone call she received from the claimant regarding the notes to be a complaint. She assumed that the claimant had received a copy of the company handbook.

The next witness, hereafter known as JB gave evidence that she is an office manager and has six years experience with the company. She was also a shop steward for 3 years. She managed the shop where the claimant was employed, beginning in June 2007. It is part of her remit to ensure that cleanliness within the shop is to a certain standard. Each shop has the same required standard of cleaning and the checklist needs to be followed. On the first day that she worked in the shop where the claimant was employed there was dirty water in the toilet, there was no bin liner in the bins and the sink area was filthy. She could not recall the T.V screens or monitors ever being polished. She cleaned the shop herself during the day when cleaning standards were low. She assumed that no cleaner was employed in the shop as there were no cleaning products on the premises. On discovering that there was, she left a note requesting to please ensure that certain matters were dealt with, and pointing out that if cleaning products are required, to contact herself or CE. The notes were intended as a gentle push. She did not have any contact with CE during her time working in the shop as they worked on different days. She left notes on two occasions for the claimant outlining duties that had not been performed.

Under cross examination she confirmed that she was aware of issues between CE and the claimant. She was aware of a personality clash between them but did not believe it was her responsibility to act on it. She was aware of CE's complaints regarding the claimant's standard of work but the claimant never told her that she had a difficulty with CE. The only side of the story that she was aware of was CE's. If she had received a complaint she would have contacted Human Resources department.

In reply to questions from the Tribunal she stated that it was possible that a higher standard of cleaning was suddenly applied and the claimant may not have been made aware of this. She assumed that the claimant had a contract of employment and was given a copy of the company handbook.

The next witness, CE gave evidence that she is employed as a branch manager by the respondent

company. She was employed in the shop where the claimant worked since July 2007 and currently works there. She met with the claimant on five occasions. On one occasion in October 2007 the claimant arrived in the shop before it opened. It was not appropriate for the claimant to be working on the premises while other staff members were working due to health and safety issues. The shop floor cannot be left wet as this is a health and safety issue. The safe cannot be operated due to security reasons if she was on the premises. The witness contacted a district operations manager and asked him to advise the claimant not to be on the premises during opening hours. In December 2007 the claimant arrived into the shop at 9.10pm when customers were in the shop. The shop closed that evening at 9.22pm. She left notes for the claimant as this was the only procedure she knew and there was no threat in her notes. Her notes always included the word please. She never stood over the claimant telling her that she should not be in the shop. She simply said to her that she should not be in the shop at this particular time. She never acted in a bullying or intimidating manner. The issue regarding the blocked toilet occurred in April 2008. The reason the toilet became blocked was because it was being left uncleaned. The witness cleaned the toilet on many occasions herself and also cleaned the shop.

The district operations manager visited the shop in October 2007 and she outlined to him all the issues concerning the cleaning of the shop. The standards checklist was posted up but the claimant just ticked the list without performing the duties. Standards did not improve as a result of the introduction of the checklist. Cleaning products were provided but they were left unused.

Under cross examination she confirmed that she informed her district operations manager, CR about the cleaning standards on the first occasion she met with him. She wanted the standards raised and requested a cleaning specification from him. She went to great lengths to highlight to the claimant the duties that had not been performed. She left about four notes for the claimant between October 2007 and June 2008. She hoped that a meeting that FM was trying to organize would take place but it did not and she was disappointed about that. She complained officially in January 2008 as she wanted the problem resolved but she never asked to meet with the claimant. She expressed her dissatisfaction to JB about the standard of the claimant's work. She cleaned the premises when the claimant did not do so properly. This increased her workload. The checklist was marked by the claimant with a large X on one occasion and the witness took this as a poke at her authority.

The witness went on to give evidence that she was not the claimant's boss but she understood she had authority to direct her work as she is accountable for the shop. She is not aware where the claimant fits into in the structure of the company. She found the claimant to be confrontational.

In reply to questions from the Tribunal she confirmed that she spoke to her colleague, JB by telephone if she needed to speak with her and she had issues with other colleagues she spoke with them directly. She had received no training in relation to dealing with cleaners. She received no formal training when she became a branch manager. The majority of the cleaning staff are contract cleaners and it was new ground for her to be dealing with cleaners. She was not the claimant's boss. The claimant's line manager was the district operations manager. She is not familiar with the company handbook in relation to minor infringements and was not aware that the claimant did not have a contract of employment.

The next witness, PK gave evidence that he is a district operations manager and has 15 years experience with the company. In late June 2008 he was appointed as district operations manager in the shop where the claimant was employed. He visited the shop to introduce himself and to motivate the employees. He met all employees individually including the claimant. He looked at the cleaning standards and was not 100% happy with them. He made this known to the claimant and

she replied that she was sick of people moaning at her and she was handing in her resignation. He told her that he was not accepting her verbal resignation done in haste and the claimant then left the premises. She did not raise any issues of bullying or harassment with him. A couple of days later he received her letter of resignation and he replied to this letter immediately. In his reply he gave the claimant an opportunity to meet with him to discuss the issues she had raised in her resignation letter. He received a further letter from the claimant on the 25 August 2008 and a full investigation was carried out by him as a result of receipt of that letter. The outcome of his investigation was that there was no evidence of bullying or harassment and the notes left by CE for the claimant were left as performance enhancing tools. He believed there were no instances of bullying or harassment.

Under cross examination he confirmed that the claimant did not raise any issues with him concerning CE. She told him she was sick of being moaned at and he did not believe that her concerns warranted investigation. He believed that he gave the claimant two opportunities to retract her resignation.

In reply to questions from the Tribunal he did not know why the claimant did not have a contract of employment.

Determination

This is a case in which the claimant states that she was constructively dismissed. Such a dismissal will occur where an employee terminates a contract of employment in circumstances in which, because of the employer's conduct, either the employee was entitled to terminate the contract without notice, or it was reasonable for the claimant so to terminate it. Accordingly, any constructive dismissal must therefore be examined under two headings, the first being Entitlement, and the second being Reasonableness. In both cases the termination must be in response to the employer's conduct.

Entitlement

Under this heading an employee is entitled to terminate the contract only where the employer is guilty of conduct which is either of significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. One must remember that there exists in the continuing relationship of employer and employee a mutual need for trust and confidence. Accordingly, as an employer is entitled to expect his employee to behave in a manner which would preserve his employer's reasonable trust and confidence in him, so also must the employer behave. In this case the claimant had been working with her employer for four and a half years, without incident. On the appointment of a new branch manager, under new ownership, the claimant gave evidence that she felt intimidated and bullied by the manner in which she was dealt with and she brought these matters to the attention of three senior managers, but, to no avail. It is clear from the evidence adduced in respect of the lack of notice given to the claimant in respect of the meetings, in addition to the manner in which the meetings were conducted, including the location of same, that no serious consideration was given to these matters by any of these persons. Indeed evidence was given by both the claimant and CE, who, respectively, spoke to various managers about the situation, but, in evidence these managers stated that they did not perceive same as complaints. Evidence was also adduced and the Tribunal accepts same that the claimant did not have a contract of employment and was unaware of the grievance procedure in respect of her employment. Evidence was further given by the claimant's husband as to the upset caused to his wife and their home life by these matters.. Accordingly, under this heading the Tribunal find that the claimant was indeed entitled to terminate her contract.

Reasonableness

Under this heading the reasonableness of the employee must be considered with reference to all of the circumstances of the case and especially where there have been changes in the terms, conditions or personality for a workplace, which the employee may find difficult to accept. In this case and as stated above the claimant had worked for the employer for four and a half years, without incident. Difficulties only began when a new branch manager was appointed under new ownership. Evidence was given of the notes left by the branch manager, and the manner in which she spoke and dealt with the claimant, in respect of her cleaning duties, which the claimant stated, left her feeling belittled and unhappy. Evidence was given that the claimant sought to raise the matter with three of her senior managers but, from the evidence adduced it is clear that the complaints were not taken seriously. One only has to examine the timeframe the claimant was given in respect of meeting with her managers, and the locations and content of the meetings for this fact to become clear. Furthermore the evidence given by virtually all of the managerial witnesses for the employer highlighted a serious breakdown in communications, in that while one party believed themselves to be making a complaint about the standard of the claimants work to the other party, the party receiving this information did not either recognise or accept that these communications were complaints. In the circumstances, the Tribunal is satisfied, from the evidence that the employment became intolerable to the claimant to the extent that she was left with no option but to terminate her employment.

Findings

The Tribunal finds that the claimant was constructively dismissed from her employment and that the dismissal was unfair. On the question of redress we are satisfied that the present case is one where an award of compensation is the most appropriate remedy. Accordingly, the Tribunal awards the claimant €10,000.00 compensation under the Unfair Dismissal's Act, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

