

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

CASE NO's.

UD705/2008

MN642/2008

WT288/2008

against

EMPLOYER
under

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

I certify that the Tribunal
(Division of Tribunal)
Chairman: Ms R. O'Flynn
Members: Mr. M. Forde
 Mr J. McDonnell

heard this claim at Cork on 10th February 2009
 and 27th April 2009
 and 28th April 2009
 and 30th April 2009
 and 30th June 2009
 and 01st July 2009
 and 24th September 2009

Representation:

Claimant: Ms. Lucy Walsh BL, instructed by Francis C. Kelleher & Co., Solicitors,
 1 Pearse Square, Cobh, Co. Cork

Respondent: Mr. Eoin Clifford BL, instructed by Ronan Daly Jermyn, Solicitors,
 12 South Mall, Cork

The determination of the Tribunal was as follows:

Claimant's case:

The claimant worked for the respondent as a crisis pregnancy counsellor. She was asked to prepare policy and procedures by the employer but got no support from them on this. She raised grievance with the CEO (DS) about bullying and harassment, but not resolved. Investigation held into her complaint and report stated that best practice was not carried out in many areas, but her bullying and harassment complaint was found to be not well founded.

The claimant felt pushed out and in June 2008, had to leave. Got full pay for 3 months, half pay for

further 3 months, and then on illness benefit. The company's request to leave back the laptop or the Gardaí would be informed was the last straw.

The claimant gave evidence that she worked as a crisis pregnancy counsellor for the respondent. Her line manager (IKM) was also intimidated by DS. She constantly raised issues with DS but nothing done about it. She never got a contract of employment. IKM made an allegation about bullying against her but later withdrew it.

She attended a conference on the subject of abortion in Rome with IKM, which she found quite disturbing. She said that it was a technical conference, which was designed for specialists, but she denied that she changed her views on abortion, or that she became anti-abortion after the conference.

She said that she felt vindicated by the report of the investigation into her complaints in that the management's practices were found to be at fault, but nothing came of the report and nothing was changed. The laptop issue was the last straw, so she felt she must leave the job. She is unable to work in this field anymore, as her confidence is gone. She applied for several jobs but has been unable to go back to work.

NB: Date of dismissal: 19 June 2008, but letter from the respondent re: laptop and Gardaí: 4 July 2008

Cross-examination:

The claimant said DS asked her to carry out work on policy and procedures but gave no support to her.

She had a concern about client confidentiality whereby a HIV client died but his family opened a letter to him from the service, which upset them.

She said that her workload was too onerous and greater than IKM's. DS was unclear as to what her responsibilities were.

At the vision day in Dec 06 staff raised issues about the lack of a centre manager, timekeeping and issues about Management, but DS got angry at this. She felt hugely stressed around June 2006 and had to go on sick leave. She tried to get issues resolved with DS but to no avail.

She said that the funding was based on the uptake of services that there was a pressure to keep up the number of clients or funding would cease. She said that records were falsified to keep up the numbers.

She denied she was pro-life or that she had used the words "unborn child" as they were forbidden to use these words. She also said that free beds were offered by abortion clinics for so many clients referred to them, and refunds or reduced charges also.

She didn't understand how IKM could say that she was intimidating her. IKM had made an allegation of bullying against her, but later withdrew this. She was disappointed that PS's report had found that bullying of her by DS had not taken place, but pleased that it found DS's management to be faulty. She thought that things would change after the report but they didn't.

She had no authority to buy a scanner, but DS told her to order it. DR. C was against getting it because it would need gynaecological back up. Reason she decided to resign in Nov 06 was because DS said she had issues in her dealings with clients and that she used the words, “unborn child”. DS reported this to the Board.

She didn't agree her job description in Jan 07.

The claimant decided that she did not want mediation, but an investigation process. She met PS on 26 October and 28 November 2007. She denied that she had no intention of going back to work, but because the company did not deal with her complaints, she sent a letter of resignation on 9 July 2007. She regretted that she had not left a note when she took the laptop.

An employee (HG) gave evidence that the claimant was very professional and liked by all. She was shocked when IKM told her that the claimant bullied her. After an initial good relationship, the atmosphere between the claimant and DS deteriorated. DS's managerial style was poor, and she herself had a bad relationship with DS. She said that she was now out on extended sick leave for the second time. It is a very dysfunctional organisation. No one person, she said, was a ringleader in regard to the Kingsley meeting.

An employee (TC) gave evidence that the claimant was very professional, and that DS and the claimant got on well at the start. She said that timekeeping was lax in the organisation, which led to clients not being seen. At the vision day staff were split into groups but all said that the office needed a manager. This made DS visibly angry. She said that IKM told her she was afraid of DS. DS did not frighten her, but she did frighten others.

Respondent's case:

An employee (DS) gave evidence that they employed two counsellors in April 2006 in the areas of HIV and crisis pregnancy, and that the claimant was one of these. There was a perceived need for policy and procedures to be developed in order to be compliant with legislation and the claimant was asked to draft this policy. She did not perceive this as an onerous task, nor did she believe that the claimant needed support for it.

A vision day was held for all staff in order for their views to be aired and to devise a new strategy. Some staff thought that a centre manager/co-coordinator was necessary. She did not take this as a personal slight on her, in fact she agreed with it, but there was no funding available for it. She followed up the vision day with one to one meetings with staff. She said that she got support and supervision around her management style.

She denied that she had ever falsified figures or records, and also denied that the claimant had ever approached about such falsifications. In fact a report into the organisations practices found it to be compliant with the law. The proposal that the IFPA would offer one free bed for every four referrals was considered, but the CPA was uncomfortable with the offer, so the plan was dropped.

She approved the sending of IKM and the claimant to Rome on an abortion conference, but she was not aware that this conference was mainly for specialists in the field. She met with the claimant after the conference and the claimant seemed upset with its pro-abortion stance, because she said she was pro-life. By November/December 2006 the claimant said that her heart was not in the work and that she would leave. She informed the Board that the claimant was leaving because she was not in sympathy with abortion.

In April/May 2007 a meeting was held with IKM and the claimant at which she was asked to be a witness. IKM had alleged that the claimant was bullying her, but IKM then withdrew the allegation.

She sent an e-mail to all staff on 23 November 2007 in relation to the investigation into the claimant's complaints. She was not trying to interfere with the investigation process by doing this, but was simply asking that the staff would not be talking about the issue and would keep it in the process.

When the report into the claimant's complaints came out, she was happy that the bullying and harassment allegations made against her by the claimant were not successful, but she did dispute the report's comments on her management style. She did not make an issue of this, and agreed to attend some management training courses in order to improve her performance.

In relation to the laptop going missing she said that a staff member noticed that the laptop was gone, and that there was no note left to explain its absence. The Gardaí were called in, but the claimant subsequently said that she had taken it. She said that she was very surprised when the claimant sent in a letter of resignation on 9 July 2007. The claimant was not pressurised into leaving, she left of her own volition.

She said that some staff had issues with her at the Kingsley meeting, but most of these staff withdrew from the process. Some staff members withdrew from the original group because they felt that a witch-hunt was being conducted against her.

She said that the complaints the claimant made to her were minor ones, and she never complained to her about her workload or the need for a scanner.

An employee (IKM) gave evidence that she started work with the organisation just before the claimant. She took over from MA in the HIV counselling area, and the claimant reported to her. She denied that the claimant did all the administration work in the areas of HIV and crisis pregnancy, she did much of this work also. She had no problems with the claimant at the start, but after an external evaluation procedure was introduced, the claimant had a problem with her agreeing to the evaluation.

The claimant had told her before the Rome conference that she had a difficulty working in the job because of the abortion option. She totally denied the claimant's allegations about the falsifying of statistics, and she also denied the claimant's statement that she had told her DS was making her life hell. In fact, she was under stress from the claimant, not DS. She agreed with the claimant that a scanner would be of benefit to the organisation. She was aware in November/December 2006 that the claimant wanted to leave the job. The claimant had told her that she only stayed in a job for about two years.

She agreed to the Kingsley meeting initially and was afraid not to go because she felt she would be ostracised if she didn't attend. However she subsequently withdrew from the grievance procedure group. After she withdrew, she observed a coolness towards her from the claimant.

She had made a complaint of bullying against the claimant, but she withdrew this complaint. She denied that she failed to give support to the claimant in her work.

The HR consultant (PS) gave evidence that he was retained by the Board of the respondent to

investigate grievances raised by the claimant. He met her first on 26 October 2007. She indicated to him that she didn't want mediation, but an investigative process. She made two separate complaints. He asked her to be more specific about the allegations made, and to put them in writing, but she declined.

He believed that the e-mail, which DS sent to all staff, which asked them to keep any discussions about the grievances to be kept within the process, was probably an unintentional error.

His findings were that her complaints did not constitute bullying and harassment as defined by a *Code of Practice for Employers and Employees on the Prevention and Resolution of Workplace Bullying*, issued by the Health and Safety Authority in accordance with section 60 of the Safety, Health and Welfare at Work Act, 2005. He said that he saw them as a number of isolated incidents, and felt that they arose more from inter personal difficulties than from bullying and harassment. However, he did find that there was a Management failure to deal with the issues raised, and that DS bore a direct responsibility for this failure.

In his second report he dealt with the claimant's complaints in relation to statistical and legislative compliance. He said that this issues should be more properly dealt with by the Board, not by himself.

Cross-examination:

He said that he didn't want the claimant to reduce or redefine her complaints, but just to be more specific in order that he could understand her complaints more clearly. He accepted that there was poor communication from DS to the claimant about lots of issues, and that many of them were not addressed. He also accepted that the allegation of bullying made by IKM against the claimant was a serious matter. He said that he tried to match each issue raised by the claimant into the definition laid down by the HSE but found that it was a failure of management rather than bullying and harassment. It was the Board's job to try to resolve the issues raised and he accepted that the issues may have placed additional pressures on her. He said that he received no further feedback from the claimant after the report was issued. The organisation had a culture of lack of procedure and good practice.

A support worker (EH) said that the claimant's views on abortion changed after her trip to Rome and that she said she would be looking for other work. She was not aware of the difficulties between IKM and the claimant. She never saw statistics being falsified and understood that the claimant compiled the statistics on crisis pregnancy. She never witnessed DS bullying or harassing the claimant.

An employee (DO'M) said that although he had no grievance with DS, he attended the Kingsley meeting in support of the other staff. He now feels that he should not have gone, was not pressurised into going, but did not want to be the odd one out. After the second meeting he told DC that he was withdrawing from the grievance group. He never saw anything that would justify the staff grievances against DS.

He said that after the Rome trip he sought clarification from DS about the claimant's claim for TOIL.

A Board Director (TD) gave evidence that he was not aware of any issues that occurred before his arrival in 2006. His first involvement with the claimant was when she decided to resign. DS came

to the Board in November/December 2006 and said that the claimant was having difficulties around her views on abortion, that she was anti-abortion.

In June 2007 the Board was informed about the meeting held at Kingsley between DC, PC and the staff grievance group. The staff had raised issues around funding, the provision of a scanner, job descriptions, time in reception/cover etc. He felt that this was an inappropriate meeting, that staff could have accessed the grievance policy instead. The first step in this policy would be to go directly to their line manager.

A meeting was arranged with the claimant on 26 July 2007 to hear about the issues between IKM and the claimant. He wanted to meet them separately and informally to see if the problems could be resolved. He told the claimant that if she wanted to use the procedure she could do so, but hoped it could be solved locally.

On 10 October the Board responded to the complaints raised by the claimant. They thought that mediation would be the best way forward, but the claimant declined this. So they engaged an independent consultant PS to investigate her complaints. They didn't contact the claimant during this process because they believed that the claimant only wanted PS to contact her during the process.

Regarding the e-mail from DS to all staff on 23 November 2007 he felt that, on reflection, the Board, not DS, should have sent this. It was an honest mistake to send it, but was done in order to stop gossip being spread about the office. After PS's report came out, they received an extensive response to it from DS, but none from the claimant.

On the laptop issue he said that they thought it had been stolen, but later became aware that the claimant had it. He couldn't understand how she could take a laptop from the premises while she was out sick, or why she hadn't contacted them letting them know she had it.

After PS's report came out they investigated the issue of falsified statistics and met DS about it. They were satisfied that there was no falsification of statistics. It was always their intention to facilitate the claimant's return to work. The culture within the organisation was changed as a result of the report, and a new staff handbook was issued. DS was sent on a series of management training courses to improve her skills in that area. DS was no longer a Board member.

The Tribunal heard evidence from a doctor of the respondent. She felt that once DS was found not guilty of harassment then the claimant would return to work. The witness explained when asked that the claimant should have "complied with procedures, that is dealt with the Board (of directors) it would have put a better structure on it (the situation) I think she should have written out her grievance".

Determination:

Having heard the evidence in the within case on the 10th February 2009, the 27th April, 28th April, 30th April 2009, the 30th June 2009, the 1st July 2009 and the 24th September 2009 and having had regard to the oral submissions proffered on the behalf of the Claimant and the Respondent, the determination of the Tribunal is as follows:

The burden of proof in a claim of constructive dismissal rests with the Claimant. It is well settled law that a claimant who alleges constructive dismissal must establish, on the balance of probabilities that s/he was entitled, by virtue of the conduct of the employer to resign from the employment, or, in the alternative, the claimant must establish to the foregoing standard of proof, that the decision to resign from employment was reasonable.

The burden of proof rests with the claimant in a claim of constructive dismissal and each case falls due for consideration and must be so considered on its own facts, merits, or otherwise.

In the within case the claimant initiated a complaint of bullying and harassment dated the 28th September 2007, which complaint ran to some twenty-four type written pages. The claimant initiated a further and supplementary complaint dated the 15th October 2007, which whilst not as lengthy, raised a number of serious and compelling matters for the claimant as she saw it. The respondent appointed an investigator and the claimant engaged with the investigator (Mr. PS) in the context of evaluating and investigating her complaints. The investigation was conducted in the period October 2007 –April 2008. The duration of the investigation, whilst lengthy, was warranted having regard to the nature and extent of the claimant's complaint and the multiplicity of witnesses involved, some twenty-three in all. The Tribunal is satisfied that the investigation was thorough and comprehensive; the final report of the investigator (Mr. PS) is in the order of some sixty-six pages. The Tribunal is satisfied that the investigation could not reasonably have been conducted in a shorter time frame or more expeditiously. Whilst the claimant's complaint of bullying and harassment was not upheld, Mr. PS identified a number of failures in management practice and procedure.

The claimant was informed of the outcome of the investigation and duly furnished with the full text of the report in or about the middle of April 2008. It is noteworthy that soon after, in correspondence, which issued on behalf of the claimant dated the 2nd May 2008, the following recital appears, namely; 'our client is exonerated by the Report'. In this regard, the Tribunal regards the claimant's own evidence as significant and compelling. The claimant gave evidence that she felt vindicated by the report, she felt it was positive and she identified areas where she personally, might upon reflection, have dealt with things differently.

By way of correspondence dated the 2nd May 2008, the claimant notified the respondent that she could not envisage a situation where she would be happy working directly with DS in the future. The respondent, by way of letter to the claimant (which was addressed to the claimant personally) dated the 18th June 2008, set forth actions and measures which it had already taken and other matters which were then either in train, or in prospect, consequent upon the report of the investigator, Mr. PS. Further, the Tribunal regards as noteworthy the fact that the claimant's 'concerns' dated the 15th October 2007 were regarded by the respondent as being 'live' and warranted further exploration and attention from the respondent.

The Tribunal notes that in further correspondence dated the 18th June 2008 (addressed to the claimant's representative), the respondent advised that it was examining its policies, procedures and structures, so as to evaluate if the claimant could be facilitated in not working with DS directly. The Tribunal is satisfied, that the import of the foregoing is such that whilst the investigation had been concluded, the respondent had commenced upon the practical task of dealing with its findings and this work was underway at the material time.

The recital in the respondent's letter, dated the 18th June 2008, namely; '*we are a small organisation and do not have a range of reporting options and working structures which might be*

available in a much bigger organisation. The Board is examining its internal policies, procedures and structures and believes that this review should enable all parties to work together' is noteworthy. It is also noteworthy that at the time the aforesaid correspondence issued, only two months or so had elapsed since issuance of the investigator's report. The respondent's task of dealing with the findings of the investigator in practical and real terms cannot be underestimated.

Having heard the evidence and in all the circumstances, the Tribunal is satisfied that the claimant was not entitled to resign from the employment, by virtue of the respondent's conduct. Having heard the evidence and in all the circumstances, the Tribunal is satisfied that the claimant's decision to resign from the employment (communicated to the respondent by way of letter dated the 9th July 2008), deprived both the claimant herself and the respondent of the opportunity to explore option/s, such as may have been generated by the review process (being conducted by the respondent at the material time), or otherwise. The Tribunal regards the claimant's decision to terminate her employment as being premature. The claimant's decision to resign from her employment was not reasonable in all of the circumstances.

Accordingly, the Tribunal is satisfied that the claimant has failed to discharge the burden of proof, required by section 1 of the Unfair Dismissals Act 1977 - 2007 and hereby determines the claimant was not constructively dismissed from her employment with the Respondent.

Consequent thereon, the claim under the Unfair Dismissals Acts 1977-2007, fails.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 fails.

The Tribunal makes no determination under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)