

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD319/2009

- claimant

against
EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr T. Gill
Mr P. Clarke

heard this claim at Loughrea on 9th September 2009
and 19th November 2009
and 11th January 2010
and 12th January 2010

Representation:

Claimant(s): Mr. Shane Geraghty BL instructed by:
Byrne Carolan Cunningham, Solicitors,
Oak House, 39/41 Mardyke Street, Athlone, Co Westmeath

Respondent(s): Mr. Dominic Wilkinson BL instructed by:
Mr Aidan McGrath, Legal Advisor
Das Legal Expenses Insurance Co Ltd,
12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

Claimant's Case:

The claimant gave evidence. She commenced employment in September 1994 in the pharmacy. The business was taken over by the respondent company in 2002. At first she was happy in her work and had assisted when the premises had been remodelled. As time passed she had become unhappy in her work. It became difficult to get time off; tasks she had performed in the past were taken from her, was no longer a key holder and felt isolated. She attended her doctor in January 2008.

Sick certificates were submitted and she was requested to visit the company's Occupational Health doctor who diagnosed her with occupational stress. She was advised by the respondent to put any problems she had in writing. The letter, written by her husband, gave a list of her concerns. She felt the atmosphere had become tense and stressful. She felt isolated and felt she had been demoted, was unappreciated and not trusted. In the past she had been allowed to sit during quiet

periods, she suffered with varicose veins. She was also concerned that the Manager and staff were talking about her in a personal manner. He ended the letter requesting that his wife's terms and conditions of employment be adhered to.

She continued to absent herself from work due to sickness and continued submitting sick certificates. In March 2002/2008 her solicitor took over correspondence with the respondent.

During cross-examination the claimant contended that she had raised certain issues with the respondent over the years. She had asked the respondent to call her by her name. There was the issue over vacuuming. There was the debate over the tote boxes. She had agreed to clean when hired by the previous owner, but everyone did their fair share. The onus was mostly on the claimant under the new employer. She used to check off the medications that arrived in the tote boxes but the respondent grabbed it off her and told her that the assistant pharmacist or other shop assistant would do it. If she was alone with the respondent she was allowed to do it, but she seldom did it after the refurbishment. After then she had to stay at the counter. She felt she was being belittled. The respondent made her feel uncomfortable handling cash, pounced on her, she said two people were to handle the cash. She felt on eggshells and kept quiet towards the end.

She explained that she used to get to sit during the quiet times, which relieved her varicose veins. There was a chair behind the counter but she was afraid to sit, and stools were occasionally taken away.

The claimant liked to do errands that took her out of the shop. She used to collect prescriptions from the doctor's surgery, but this stopped. She did not know why, she believed it was another way of putting her down. The respondent did not explain the reason why; she kept things from her in later times. The respondent did not explain that there were any new processes whereby it was not necessary to go to the bank or post office anymore. The respondent didn't tell her not to answer the phone, she would say 'I'll get that'. It was the impression she gave.

After the claimant went on sick leave she felt the respondent should ring her and sort it out. The claimant did not feel able to attend the meetings alone. The meetings were cancelled because her husband or the solicitor could not attend.

The claimant agreed that she had received a copy of the staff handbook. She accepted that reasonable time should be allowed to resolve a grievance and that it was reasonable to wait until the New Year to address the issues. She did not expect everything to be resolved in a day, but issues could be resolved if the respondent was nice to her.

The claimant was satisfied that her solicitor's letter of the 12th March to the respondent's HR department (IPOS) covered all of her issues. It was the first time the term bullying and harassment was used, as it was the first time she had used the words. It was all bullying and harassment as far as she was concerned. She was happy to return until the time that she left subject to her problems being sorted out. She agreed that the letter from the respondent's solicitor replied to her complaints, but she did not feel that anything was solved. She felt that the respondent should have talked to her and sorted it out. The claimant left the matter and any arrangement of meetings in her solicitor's hands. He forwarded on letters.

The claimant contended that the previous employer had always paid sick leave.

A former employee of the respondent gave evidence that she worked as a shop assistant for approximately a month at the pharmacy. She was asked if she could be flexible and said yes and was told that the claimant was quite difficult and would only take Wednesdays off. When she started the respondent told her not to tell the claimant that she had started and that the girl on the

following day knew. She found that there was always a tense atmosphere at the pharmacy.

The witness had to go home sick one day and wasn't paid for it. The other shop assistant told her that she always got paid sick leave and that when there was a problem with her wedding dress the respondent gave her a paid week off to look for another one.

The respondent said that the other shop assistant had to work a day in her brother's pharmacy during the week that the claimant had requested off. The witness did not believe this as the shop assistant had said she wasn't doing anything. The witness rang the other pharmacy and asked for the shop assistant, but she wasn't there. There was no seat to sit on in the shop for staff. She took a stool out but it was removed.

When the witness was leaving the employment she told the respondent that she was upset at how the claimant was being treated and that she was starting to treat her in the same way. The respondent did not ask why she was leaving she said that she thought the witness would change her mind.

The claimant's husband gave evidence that his wife starting becoming stressed in her work two or three years after the respondent's takeover. She complained of having nowhere to sit, which was important because of problems with her veins.

When he delivered the first sick note her told the respondent that it had certain connotations. He went with his wife to the pharmacy on December 18th 2007, as she was unable to orchestrate it herself. While initially reluctant to put the complaint in writing he did so with his wife and gave it to the respondent on January 8th 2008. His wife attended a doctor's appointment arranged by the respondent. The doctor's report confirmed the claimant's GP's diagnosis and therefore they wished to revert to seeing her GP. This then led to counselling.

They received a registered letter on a Friday, from the respondent, seeking a meeting the following Wednesday, which did not suit him, as he was a school principal. The respondent said on Monday that the pharmacy scheme representative would be at the meeting. At that point they decided to get legal advice and did so in early February. He had to reschedule the next two meetings as he had set them up without checking that his solicitor was available. After that the solicitors dealt directly with each other.

During cross-examination the witness stated that he was aware of the respondent's offer to meet put in the letter of April 21st 2008. The witness was always willing to meet with the respondent, but the legal representatives seemed to be having difficulties with correspondence.

The witness could not recall the term grievance procedure being used at the meetings with the respondent. He was aware of the staff handbook but the respondent did not recommend that any sections of it be invoked.

Respondent's Case:

The claimant's General Practitioner (GP) gave evidence that he first met the claimant on November 3rd 2007. The claimant was suffering from severe Anxiety Depressive Neurosis arising from stress in the workplace. He suggested that she try to resolve the issue directly with her employer. He certified her for four weeks sick leave.

On December 4th 2007 he reviewed the claimant. She said that she had had no contact from her employer, which confirmed for her that her employer did not want her back. She was too distressed to contact her employer. He was not aware that the claimant's husband had contacted

he respondent on December 3rd 2007. He was aware that the respondent's father had died and that the claimant had attended the funeral. The GP prescribed antidepressants to the claimant and arranged a review for four weeks time.

The next review of the claimant was on January 5th 2008. He noted that they were trying to resolve the situation but that there was little follow up to the meeting. He agreed that if he had known that there had been two meetings he would have amended his note about 'little communication'. The claimant had been referred to an occupational physician, which the GP encouraged. He continued the claimant on the same medication and arranged to review the claimant after her appointment with the occupational physician.

The GP next met the claimant on February 1st 2008. The claimant's symptoms were much improved. He was not aware that the claimant had suggested a return to work date of January 21st 2008 to the occupational physician. He knew that at all times the claimant was seeking a way to return to work. The occupational physician agreed with the GP's diagnosis and recommended more time off work until the issues were agreed. The claimant continued to cite being unhappy at the lack of communication between herself and the respondent. She believed that the respondent had no interest in her returning to work. The GP was unaware of the cancellations of meetings by the claimant and could not comment on it, as he did not know the background to it.

The GP next reviewed the claimant on March 18th 2008. She showed considerable improvement, but was still suffering a number of symptoms. She reported that she felt frustrated with the process and that she and her husband had sought legal advice. The GP referred the claimant to a psychiatrist for counselling. The psychiatrist diagnosed the claimant as suffering from Post Traumatic Disorder secondary to bullying in the workplace. The GP was satisfied to amend his diagnosis to this.

The GP spoke to the claimant on the phone on June 11th 2008. She reported that no progress had been made regarding the situation. He found that her condition had improved, but no further than the point reached after two month's medication. She was avoiding people and not going to the village as people were asking her when she was going to return to work. The claimant attended the clinic on June 17th 2008 and saw a different doctor. She reported the same frustration at the lack of progress. The GP was not aware of attempts to meet.

During cross-examination the GP confirmed that the claimant was still being prescribed anti-depressant medication. He stated that the reason the claimant's husband would need to attend meetings with the respondent was that the claimant was unable to deal with such meetings alone due to the severity of her symptoms.

The Psychiatrist that treated the claimant gave evidence that the first time she met her she carried out an evaluation of her mental state and diagnosed Post Traumatic Disorder. This type of disorder generally presents after a trauma – acute or prolonged. In the claimant's case it was over a prolonged period of two or three years. The claimant was tearful and very distressed when she first saw her on April 4th 2008. She was trying to avoid contact in a small community and was trying to hide away.

The claimant told her that she was suffering from stress in the workplace and that she was exposed to bullying and was feeling demeaned by her employer. She described being set menial tasks such as sweeping the pavement and cleaning the toilets and no one else being asked to carry out these tasks. Also, having previous responsibilities removed and not being provided with training when changes were made. She reported being ignored or contradicted in front of customers. Not being allowed to answer the phone or handle medications. She was previously a key-holder, which was removed. She reported having had a good relationship with her previous manager, but she found

her new manager to be nasty, dismissive and frequently would not answer questions. She had a good relationship with customers and she felt that the manager was unhappy about this.

The claimant became anxious, suffered from abdominal stress, weight loss and persistent insomnia. She reported being so stressed when she came home from work that she had to walk around for twenty minutes to calm down.

At all times she stated her intention to return to work. She realised she could not do this straight away and would need treatment. The witness recommended counselling and increased her medication, which was a normal practice. She believed mediation with the employer was to take place and believed this was a good idea. It would depend on the outcome whether or not the claimant could return to work.

The witness knew that there were discussions going on about the situation, but her concern was the health of the claimant. She encouraged her to resolve the issues. The witness stated that there were no other life events in the claimant's life that might have contributed to her illness. The claimant was still on anti-depressants as they are normally prescribed over a long period of time. The witness believed that the claimant would require the medication of a year and then until the situation was resolved.

The respondent gave evidence that she purchased the pharmacy in part on January 4th 2002 through a pharmacy purchase scheme. The employees were retained under the same terms and conditions. As far as she understood the staff were not paid for sick leave. The claimant had one sick day in 2007, prior to the period leading to the end of her employment, which she was not paid for. The claimant did not raise this issue with her.

The building was refurbished in 2005. They moved to temporary premises during the period. The claimant helped with the move, but not after hours.

The claimant had cleaning duties, which included sweeping, vacuuming and dusting. The respondent also undertook these duties. In 2006 there was an incident when a customer collapsed in the shop. The vacuum cleaner was out at the time as the claimant had been using it. The respondent was not on the premises at the time but when she heard about it she viewed the CCTV footage. The vacuum was not the cause of the customer's collapse, but the respondent identified it as a risk and instructed the claimant that hovering should be carried out when the shop was closed. The claimant vacuumed again when the shop was open and the respondent tried to ask her to stop and had to turn off the vacuum cleaner in order to get her attention. The claimant was not happy for a few days, but the respondent did not recall it being raised again.

With regard to seating the shop had a chair on the shop floor for customers, which was required in order to dispense government schemes. There was a high stool in the dispensary for putting boxes on while unpacking them. It was a narrow area and it would not be possible to pass by if someone was sitting on it. There was no area for breaks. Originally staff would sit in the dispensary and go out if a customer came in. The pharmacy closed from 1-2pm. The claimant went home for lunch.

The claimant continued to liaise with sales representatives, but the respondent would check the order at the end for stock control purposes and to check the prices. She believed that the claimant had carried out this function previously. She had not removed this duty.

The claimant was not allowed to accept deliveries. She did on occasion when the respondent was delayed. She left them in her car or on the street. She spoke to the claimant about it and wrote to her as it continued to happen. The claimant continued to mark off orders.

The respondent introduced a new system requiring two people to count cash transfers between the

register and the safe. There was €300.00 unaccounted for in 2008. The claimant participated but would come to the dispensary to ask for change and would leave money on the dispensary counter, which the respondent would then have to check and come out.

A new computer system was introduced in February 2007. The computers in the dispensary and at the counter had previously been linked and if one crashed both required re-setting. The new system had two separate systems, which was the same as in her brother's pharmacy, which allowed staff to work between the two shops. There was no necessity to train the claimant on the new dispensary computer. She received training for the sales counter computer. The respondent trained the claimant on how to use the passport photo camera.

The respondent moved their bank account to another bank, which did not have a local branch. The claimant was then only required to go to the local bank to get change. Due to email and direct debit the respondent did not have to use the post office as much. At the time she would have explained why she was not banking across the road and not sending letters. She could not recall the claimant raising the issue and she never objected to the changes.

The claimant used to collect prescriptions from the doctor's surgery for patients, but the respondent stopped this practise, as over time there were mistakes. The respondent wanted the onus to be on the patients to collect their prescriptions and to rectify any mistakes. The respondent would have given an explanation for the change. The claimant had not objected.

After the refurbishment the shop had a different layout and was three times the size. The dispensary was on a height so that the respondent could look out and supervise. The sales counter was no longer directly in front of the dispensary and the claimant was required to stay at the counter. The claimant was now also further away from the phone, which was in the dispensary to allow for confidentiality. It was not practical for the claimant to answer the phone after the refurbishment. The claimant did not raise the issue.

The relationship between the parties was cordial and they chit chatted generally. They never went to lunch together as the claimant went home for her lunch.

The claimant informed her that staff were given a pay rise every April, which the respondent checked with the previous owner through the pharmacy scheme. The respondent did not give a pay rise in April 2007 as profits were down due to changes in government schemes.

The claimant was given an opportunity to go on a counter assistant course but she refused, as she would have to travel. The respondent would have paid for the course and travel expenses.

In October 2007 the respondent could not facilitate the claimant's holiday request for the full week of the October bank holiday. The respondent's father was seriously ill and her family were not available to work. The respondent's brother had asked her if she could provide cover for a day in his pharmacy. Another employee offered to do that day, which meant that the claimant could not take a full week off. Another employee gave her notice the week before the bank holiday week and the respondent could not then provide a staff member for her brother's shop. The claimant was aware of the respondent's father's condition.

There was an issue with a customer returning goods to the shop that had not been purchased there. The respondent instructed that if a customer was returning goods she should be notified to see if a credit note or refund was appropriate. There were incidents involving incorrect pricing so the respondent asked the staff to initial sales stickers they applied so the respondent could see who was making the error and speak to them. The claimant refused to do this. The respondent asked the staff how to improve this, but she did not hear back about it. She considered a different coloured sticker for each staff member.

The claimant was a key-holder for a period of time, which the respondent remunerated her for by way of a lump sum payment. In April 2004 a new pharmacist was employed to work between the respondent's pharmacy and her brother's pharmacy. He held the keys after that. The claimant retained the extra payment. Staff handbooks were provided in 2003.

The first time the respondent was aware that the claimant was suffering from occupational stress was on November 3rd 2007 when the claimant's husband brought in a sick certificate. He indicated that it was serious due to the nature of the illness. She was shocked. The respondent did not contact the claimant. She saw her at the respondent's father's funeral on November 29th 2007. The claimant's husband dropped in another cert on December 3rd 2007 covering another month's sickleave.

The respondent phoned the claimant about the Christmas party, on December 8th 2007, but there was no reply and she left a message.

The first meeting between the parties was on 18th December 2007, when the claimant and her husband came to the pharmacy when it was closed. The claimant and her husband discussed their issues. The respondent asked that they put their issues in writing so that they could clear the air and that no new issues would come up. They were reluctant to do that.

The next meeting was held on January 2nd 2008. The respondent again asked for the issues to be put in writing. The respondent was unsure if she asked after the claimant's health. She did not want to upset her. The respondent wrote to the claimant on January 7th 2008 and asked for her grievances in writing. The claimant's husband brought in a handwritten letter after that.

The respondent kept her line manager at the pharmacy scheme informed and sought advice from them. Her line manager recommended referring the claimant for medical treatment due to the nature of her sick certificate. The respondent arranged an appointment for the claimant and received the doctor's report afterwards, dated January 16th 2008.

The respondent wrote to the claimant on January 23rd 2008 seeking a meeting on January 30th 2008. Two days prior to the meeting the claimant's husband cancelled. The respondent could not recall if she asked the claimant's husband to come back with new date. The claimant's husband came to the pharmacy on March 18th 2008 and asked the respondent if she was available to meet the following week. An arrangement was made for March 25th 2008.

The respondent was unaware that the claimant and her husband were intending to bring a solicitor. She believed that it would be the three of them and her line manager. The claimant's husband phoned on March 20th to cancel the meeting and April 1st 2008 was suggested as an alternative. He then cancelled that meeting as he wanted to have a solicitor present and that date was not suitable for the solicitor.

The respondent received a letter from the claimant's solicitor containing the claimant's husband handwritten note. The respondent provided a response to each point for her solicitor who drafted the reply.

The respondent was frustrated by the process and was willing to meet the claimant to resolve the issues so that she could return to work. The respondent was aware of other offers to meet made by her solicitor. The last sick certificate received on behalf of the claimant was dated 20th September 2008. The claimant's position has not been replaced. The first notification of bullying and harassment was in a letter from the claimant's solicitor on 12th March 2008, the respondent was unaware of this letter until April 1st 2008.

During cross-examination the respondent confirmed that she had not contacted the claimant or ask how she was after receiving her first sick note on November 3rd 2007. She wanted to let things settle down, due to the nature of the note, and didn't want to exacerbate the claimant's condition. She accepted that contacting the claimant would have assisted that matter. She contacted her line manager after she received the first certificate. He told her to wait a month and see.

The respondent confirmed that there was no investigation after receipt of the claimant's second note on December 3rd 2007. The claimant and her husband came to the pharmacy of their own volition on December 18th 2007.

In early January 2008 the respondent and her mother met her line manager informally off the premises. He took notes but the respondent did not read or sign them. The line manager did not speak to the claimant. A letter from the respondent's representative to the claimant's representative dated 10th April 2008 refuted the claimant's allegations. The respondent accepted that the claimant's grievances were with her.

When the meeting scheduled for January 23rd 2008 was cancelled the respondent asked the claimant's husband to come back with a suitable date. She agreed that she had not informed the claimant and her husband that she intended to a pharmacy scheme representative in attendance at the meeting scheduled for January 23rd 2008. She agreed that she did not attempt to contact the claimant or her husband between then and the claimant's husband coming to the pharmacy on March 18th 2008.

The respondent accepted that the claimant's solicitor wrote on March 12th 2008 to the pharmacy scheme requesting that an investigation be carried out into the claimant's complaints of bullying and harassment. She agreed that the pharmacy scheme staff handbook stated that 'if the problem relates to your Pharmacy Manager it should be reported directly to the relevant business manager. Complaints will be dealt with sensitively and as confidentially as possible'.

The respondent stated the terms and conditions remained the same for staff after the takeover. The terms and conditions were not written down the respondent asked the staff what they were as issues arose. Procedures and roles changed gradually on an informal basis. She asked the claimant and another member of staff to initial price tags and both refused to do so. The other employee left the employment, as she was unhappy to initial the price tags.

She agreed that the claimant accepted drug deliveries in good faith. The respondent could not recall telling a trainee pharmacist not to show the claimant how to use the passport photo camera. She disputed the contention that another member of staff was paid for sick leave and to shop for a wedding dress. No employee is paid sick leave as decided between the pharmacy scheme and the respondent. She agreed that the claimant sought leave for the week of the October bank holiday in August. The respondent had already promised cover for her brother's pharmacy.

The vacuuming had to be done after 1pm or 6pm. She agreed that the claimant worked after 6pm, cleaning up, but that she was not paid for this time.

Determination:

In a constructive dismissal case the onus shifts from the employer to the employee to claim that the conditions of the employment were such that it was intolerable for the employee to continue in the employment. Section 1 of the Unfair Dismissals Act, 1977, states:

“*dismissal*”, in relation to an employee, means—

(b) the termination by the employee of his contract of employment with his employer,

whether prior notice of the termination was or was not given to the employer, in 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...

Changes in the claimant's position were unilaterally and incrementally imposed. The Tribunal is persuaded by the actions of the claimant, through her husband, in lodging her list of complaints in January 2008. The Tribunal is of the view that the employer failed to adequately address these issues and failed to make any effort to conciliate the claimant in that effect. Ongoing professional exchanges did not bring about an amelioration. Taking all the circumstances into account the Tribunal awards the claimant €12,000 (twelve thousand euro) in compensation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)