

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE -*Appellant*

CASE NO.
UD227/2009

against

EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Fahy B.L.

Members: Mr. J. Killian
Mr. T. Kelly

heard this claim at Limerick on 23rd March 2010 and 24th March 2010 and 25th March 2010

Representation:

Claimant: Mr. Alan Ledwith B.L. instructed by Bowler Geraghty & Company,
Solicitors, 2 Lower Ormond Quay, Dublin 1

Respondent: In Person

The determination of the Tribunal was as follows:

Preliminary Issue:

Dismissal as a fact was in dispute between the parties.

Representation for the claimant submitted that the claimant was dismissed by way of handwritten letter dated 27th July 2008, which lead the claimant to believe in no uncertain terms that her employment had been terminated. The letter of the 27th July 2008 was opened to the Tribunal. This letter followed a meeting, which took place on the 25th July 2008. The letter concluded by Mr. H of the respondent informing the claimant that he was instructing counsel to draft proceedings against the claimant for breach of contract.

It was the respondent's case that the claimant resigned from her employment. After the meeting of 25th July 2008, the respondent wrote a letter to the claimant dated 25th July 2008. The letter invited the claimant to make proposals in writing to address the respondent's concerns regarding

he claimant's performance prior to a further review meeting in August 2008.

The handwritten letter of the 27th July 2008 was written by Mr. H of the respondent but it was written as a personal letter to the claimant. The letter was not intended to dismiss the claimant and her employment was not terminated by virtue of that letter.

Determination on Preliminary Issue:

The Tribunal finds there was a termination of contract by the respondent, as it was reasonable for the employee (the claimant) to consider her employment terminated having received letter dated 27th July 2008 with the threat of legal proceedings, which was a follow up from the meeting on the 25th July 2008, which was a stormy and hostile meeting.

Respondent's Case:

A contract of employment for the claimant was drafted but not signed by the claimant. The claimant's duties were not specified in the contract but were verbally communicated to the claimant. The claimant was employed to carry out family law and litigation work as well as other legal matters. It was envisaged that the claimant would replace Mr. H who would be retiring from the practice.

Mr. H gave evidence to the Tribunal that due to ill health he planned to retire from the respondent's practice. The respondent advertised for a solicitor and the claimant was interviewed and subsequently commenced her employment with the respondent in November 2007. During the claimant's interview fees were discussed in relation to the Wilson File System. A target was not provided to the claimant at that time but she was informed that if her intake of fees increased so too would her salary.

After the claimant commenced employment she informed the respondent that she was getting married and she was subsequently absent from the office from the 21st December 2008 to 16th January 2008. As a result Mr. H had to postpone his retirement until after her return.

Mr. H subsequently retired on the 14th February 2008 and he left instructions that the claimant should contact him if she had any queries on the files. Between the 14th February 2008 and the 25th July 2008 the claimant contacted him twice.

Ms. H gave him updates on the practice. She informed him of meetings she had with the claimant concerning issues on clients' files. Mr. H received a telephone call from the bank regarding the respondent's overdraft. He spoke with Ms. H following the telephone call from the bank and she informed him that she had asked the claimant for a list of clients she had carried out work for and the fees that had been generated on those files.

Ms. H of the respondent was holding an important meeting with a client on the 23rd July 2008 and they spoke on the telephone prior to the meeting. Ms H was anxious about the meeting with the client but Mr. H reassured her and asked her what they would they do about the claimant. After the telephone conversation Ms. H was making her way to the meeting when the claimant told her she was pregnant. Mr. H believed the claimant had listened in on the telephone call between himself and Ms. H.

Mr. H subsequently telephoned the claimant on the 23rd July 2008 and asked her to attend a meeting on the 25th July 2008 to find out “where they were going”. The claimant requested an agenda for the meeting. An agenda was prepared and sent to an external office to be typed.

Mr. H had prepared a document for the meeting on the 25th July 2008 and he read this at the meeting. He made a note after the meeting of what had occurred. The claimant stated she had brought in €13,219 in fees but Mr. H stated that she had only brought in €6,190 in fees. Mr. H put it to the claimant at the meeting that she should be generating fees of €8,500 per month to justify her salary. The claimant said that she was pregnant and Mr. H informed her that the issue was money, not her pregnancy. There was little response from the claimant to the issues addressed on the agenda. Mr. H gave a target of €8,500 to the claimant to be raised by the end of August 2008. He told the claimant that if she did not meet this target she could consider herself on protective notice. It was a difficult meeting.

A letter dated 25th July 2008 issued to the claimant after the meeting. Mr. H subsequently wrote letter dated 27th July 2008 to the claimant. Mr. H did not agree that he had terminated the claimant’s employment by stating that he was issuing proceedings to counsel for breach of contract. The respondent subsequently received medical certificates from the claimant certifying her unfit for work up to the 19th August 2008. Letter dated the 15th August 2008 arranged for the claimant to be examined by the company doctor on the 21st August 2008 but the claimant did not attend the appointment.

During cross-examination Mr. H stated there was no need for him to explain a reporting structure to the claimant at interview, as it was a small practice. He told the claimant he was drafting an employment contract and she should revert to him if she had any issues with it but she did not raise any issues regarding the contract.

In reply to questions from the Tribunal, Mr. H confirmed that in the letter of the 25th July 2008 (written after the meeting of the same date) he and Ms. H had requested proposals from the claimant. Mr. H stated that he subsequently wrote letter dated 27th July 2008 because he was stressed after the meeting of the 25th July 2008 and “wanted to spell out some home truths.”

Ms. H gave evidence to the Tribunal that the claimant was employed on a one-year contract but it was a contract with options. At interview the candidates were informed that the respondent was looking for a partner.

Soon after the claimant commenced employment in November 2007 she informed Ms. H that she was getting married in December. The claimant was absent on leave for a period of time up to 16th January 2008. Ms. H stated that while she had no difficulty with the claimant getting married it did mean that Mr. H had to postpone his retirement. It was made clear to the claimant at interview that the position was envisaged as a replacement for Mr. H. The claimant received holiday pay for the period she was on leave.

In order that the claimant would know what expectation was on her in relation to fees, Ms. H went through the Wilson File System with her and demonstrated the method used to calculate fees.

Ms. H did not observe the claimant’s work during January, as the claimant was a qualified solicitor and it was expected that she did not need to be monitored but would provide updates on case files. Mr. H subsequently retired on 14th February 2008. During that month Ms. H enquired of the

claimant at various times how she was managing various case files.

The claimant was absent on sick leave on 3rd March 2008. During her absence Ms. H realised that there was no post coming to the office for the claimant. On the day the claimant returned from sick leave, Ms. H examined the claimant's post tray and discovered that the claimant had written just three letters that day.

The claimant was also absent on sick leave during April 2008. When she returned from sick leave on the 29th April 2008 she requested payment of her wages during the time she was on sick leave. Ms. H informed the claimant that payment when on sick leave was discretionary. Ms. H agreed to pay the claimant on this occasion but informed her that sick leave would not be paid on the next occasion. The claimant was subsequently absent on sick leave for four days during May 2008.

Ms. H outlined to the Tribunal issues that arose on client files. She addressed these concerns with the claimant during different meetings in the lead up to July 2008. Ms. H requested a progress report from the claimant and the claimant submitted this to Ms. H at a meeting on the 29th May 2008.

On the 24th June 2008 Ms. H found a memo from the claimant on her desk relating to annual leave she was taking in August 2008. Ms. H also had her annual leave booked for August and she raised the issue with the claimant. The claimant stated that as the holidays only overlapped by a half-day and she would work until 12pm on that day. Ms. H allowed the claimant the annual leave as she had already paid for her holidays.

A number of issues regarding clients came to Ms. H's attention during July 2008. As a result she became very wary of the claimant. On the 9th July 2008, Ms. H held a meeting with the claimant. Ms. H had financial concerns and she made the claimant aware of this issue. Ms. H brought the most recent bank statement to the meeting, as she wanted to impress upon the claimant her serious concerns. On that date Ms. H raised the issue of the claimant's work in relation to a number of clients. Details of the individual situations were outlined to the Tribunal. Ms. H brought to the claimant's attention the sum of salary she had received compared to the fees that she had generated since being employed. The claimant asked for a guarantee of her contract. Ms. H told the claimant she could not give her such a guarantee and she requested a list from the claimant of her progress on files to date and she informed the claimant that a review meeting would take place.

On the 10th July 2008 the claimant produced the list. The claimant for a subsequent meeting also produced an updated version of the document. Both documents were opened to the Tribunal. The respondent gave detailed evidence to the Tribunal on the list of case files the claimant had produced and on issues that arose in relation to those files.

On 11th July 2008 the claimant approached Ms. H to sign a wages cheque. Ms. H thought this was strange as it was mid-month.

On 23rd July 2008 Ms. H was attending a very important meeting with a client. Prior to leaving her office she held a telephone conversation with Mr. H and they discussed when they would hold the claimant's performance review. As Ms. H left her office for the meeting the claimant approached her and shouted to Ms. H that she needed to talk to her. Ms. H asked the claimant if it could wait until later as she was on her way to the meeting. The claimant informed Ms. H that she had attended her doctor and that she was pregnant. Ms. H replied "fine" and made her way

to the meeting with the client.

The review meeting that Ms. H had suggested at the meeting of the 9th July 2008 had still not taken place. Mr. H subsequently arranged this meeting for the 25th July 2008. The claimant requested an agenda for the meeting and this was provided in writing to the claimant on the 24th July 2008. It stated that Mr. H as principal in the practice, was seriously concerned about the claimant's performance and conduct to date. The items on the agenda for discussion at meeting were performance, conduct, annual leave, sick leave, tax issues and method of salary payment.

At the meeting on the 25th July 2008 the claimant was allowed a representative to accompany her to the meeting but not a colleague. The claimant's husband attended the meeting with her. The items on the agenda were addressed at the meeting. A letter was sent to the claimant after the meeting had concluded. This letter was opened to the Tribunal and stated that the meeting was a review of the claimant's performance and conduct at work and it outlined the issues discussed at the meeting. The letter concluded by stating that it was disappointing that the claimant did not make any proposals or suggestions at the meeting of how to address the respondent's concerns going forward. The respondent awaited hearing from the claimant with her proposals prior to her annual leave. The meeting was concluded with an agreement to review the claimant's progress on the 14th or 15th August 2008.

When Mr. H retired in February 2008, Ms. H was responsible for the office. The claimant was aware of this when she received a personal, handwritten letter from Mr. H dated the 27th July 2008.

Ms. H subsequently wrote letter dated the 29th July 2008 to the claimant as she was absent from work on sick leave and had submitted a medical certificate covering the period from the 28th July 2008 to the 4th August 2008. Ms. H was also aware from other staff members that the claimant had informed them that she had given her notice. The claimant continued to submit medical certificates in August 2008 and Ms. H arranged for the claimant to be examined by the respondent's company doctor on the 21st August 2008. The claimant failed to attend as arranged and the respondent received no further medical certificates from the claimant. As there was no request from the claimant for her P45 the respondent was unsure of the position. Ms. H wrote five letters to the claimant but did not receive a response.

During cross-examination it was put to Ms. H that the claimant did not receive feedback that her performance was in any way unsatisfactory. Ms. H stated that it was because of the claimant's performance that she sought a review at the meeting on the 9th July 2008. Before making a proper assessment of the claimant's performance she required the progress report, which the claimant produced on the 10th July 2008. Ms. H accepted that she did not follow up on any meetings with a written letter.

It was put to Ms. H that the letter of the 25th July 2008 was written to the claimant two days after she announced that she was pregnant but no letters of warning had issued to the claimant in the previous seven months of her employment. Ms. H stated that the letter was written due to the claimant's behaviour at the meeting of the 25th July 2008 and the fact that she refused to go through the progress report that she had produced and because of her treatment of Mr. H. Ms. H realised that she had to document the meeting. Ms. H also stated that she had met with the claimant on the 9th July 2008 and requested a progress report list, which the claimant had produced to her on the 10th July 2008.

It was put to Ms. H that there were no issues raised with the claimant prior to the 25th July 2008 and that there was no evidence to support her claim that other meetings had taken place with the claimant. Ms. H stated that the claimant had produced a list in May and July 2008 as a result of meetings held with the claimant.

In reply to questions from the Tribunal, Ms. H stated that she considered the meeting of the 9th July 2008 to be a verbal warning to the claimant. She did not write a letter to the claimant regarding that meeting.

Ms. H was recalled on the 25th March 2010. She submitted a document showing the fees she had earned in the period from 1st December 2007 to the 25th July 2008. During cross-examination on the figures Ms. H stated that she did not expect the claimant to earn the same amount in fees. Ms. H acknowledged that some of the fees, which she received in early 2008, were for work done prior to December 2007.

Giving evidence Ms. T stated that she is employed by the respondent as a legal secretary. She re-commenced employment with the respondent in April 2008 and worked with the claimant until July 2008. The claimant informed her in July 2008 that she had given four months notice to the respondent.

Ms. T recalled Mr. H telephoning the office to speak to the claimant. The claimant later told Ms. T that Mr. H wanted to have a meeting. Ms. T knew at that time that the claimant was pregnant. The claimant was afraid she was going to be sacked for being pregnant and was upset. Ms. T reassured the claimant.

Giving evidence Ms. C stated that she is employed by the respondent as a legal secretary and that she also worked with the claimant. As part of her role Ms. C checks through files to see if they require any update. Ms. C gave a file to the claimant with a memo of work to be completed on the file. However, no work had been completed on the file. Ms. C was present in the office on the 25th July 2008. As she made her way to the exit the claimant told Ms. C she had been dismissed.

Ms. F is employed by the respondent as a secretary. She gave evidence that she commenced employment with the respondent in March 2008. On the 10th July 2008 some staff members were in the canteen. The claimant said that she had a meeting with Ms. H and that Ms. H had not guaranteed the claimant's contract and that four months notice had been given.

Ms. D is employed part-time by the respondent. Ms. D knew the claimant had a meeting with Ms. H in July 2008 and that the claimant had been told that her contract may not be renewed after the year and that the claimant had given four months notice. The claimant told Ms. D that she was getting no job satisfaction and that she was considering opening her own business.

Claimant's Case:

Giving evidence the claimant confirmed that when she attended for interview she was aware that Mr. H would be retiring. As a result the position offered to the claimant was one with a

management opportunity. A few days later the claimant was offered the position and she received a draft contract after she had commenced employment with the respondent. The claimant did not sign the contract.

She subsequently commenced her employment with the respondent on the 27th November 2007, reporting to both Ms. H and Mr. H. There was no indication of Mr. H retiring at that time and the claimant completed whatever work she was given by Ms. H and Mr. H.

The claimant was not given specific targets to meet but she embraced the fee system, as it was an opportunity for her to earn additional income. The claimant was informed that she would take over Mr. H's files once he retired but she was not given charge of these files until he retired in February 2008. It was Mr. H who earned the fees on those files until that time.

The claimant was informed that she was pregnant on the 1st July 2008. She suffered a fainting attack on the 21st July 2008 and decided that she should tell the respondent sooner rather than later that she was pregnant. She attempted to speak to Ms. H a number of times. On the 23rd July 2008 she asked Ms. H if she could speak with her and Ms. H asked if it could wait. The claimant said it was urgent, as she was feeling unwell. The claimant told Ms. H that she had been to the doctor and that she was pregnant. Ms. H threw her eyes up to heaven and said, "Oh right" and looked at the claimant in disgust.

At 4.05pm Ms. T informed the claimant that Mr. H was on the telephone. When the claimant picked up the call, Mr. H said, "I've got something to tell you -meeting on Friday, just be there." The claimant was stunned and very concerned, as she had not been speaking to Mr. H since he retired in February 2008. Mr. H would not elaborate on what the meeting related was about.

The claimant worked the rest of the day and at 5.30pm she asked Ms. H for an agenda for the meeting. The claimant received the agenda for the meeting and the issues on the agenda related to her performance, annual leave, tax, method of payment and conduct. The claimant was so surprised by the items on the agenda that she was unable to sleep.

The claimant's husband accompanied her to the meeting on the 25th July 2008. Mr. H read from a script and the claimant was not given the opportunity to respond. It was put to the claimant that she had failed to meet statutory deadlines, that she was not performing in her role, was not billing enough, was incompetent and other issues were raised concerning her sick and annual leave. The claimant was not given an opportunity to respond to these charges. Any response the claimant tried to give was shouted down. The claimant felt threatened at the meeting.

The claimant stated that she had no power to take in fees until the end of February 2008 and that it had taken her time to review and put order on the files. When she took charge of Mr. H's files she discovered there was correspondence that had not been attended to. The claimant had to re-organise the files and she made a list of work that needed to be completed on the files.

The claimant outlined a number of obstacles she encountered in her role in relation to generating fees. The claimant wanted to go on a private panel for the legal aid board as she had previous experience of this. She requested a tax clearance certificate from Ms. H as was required but this was not forthcoming.

The main obstacle she encountered was the lack of organisation on Mr. H's files. Many of his files also had fee arrangements in place, which meant that the client would not be billed until the work

was complete. The claimant wanted to generate as many fees as she could, as it would mean extra income. She could not understand how the office could sustain not billing customers until files were complete. The claimant prepared the list regarding fees for her own personal use and she enquired from Ms. H if she could bill certain customers. The claimant had previously drawn Ms. H's attention to the fact that Mr. H had fixed arrangements in place on files.

The claimant stated that she had created the document dated the 29th May 2008 for her own personal use. Ms. H had not requested her to produce this document and the claimant did not know how Ms. H came to have the document in her possession. The purpose of the document was for the claimant's use to reflect the work she had completed on various files. It was a draft document without specifics.

The claimant stated that she had produced the list of the 10th July 2008 because she wanted to show Ms. H what her position was. The claimant knew the customers on the list very well, she had met them and moved their cases along but the claimant could not invoice without approval from Ms. H and she needed this to generate fees. She had raised the issue with Ms. H and suggested taking in money on account but Ms. H did not make much of the claimant's suggestion.

The claimant's performance was not addressed by the respondent prior to informing Ms. H of her pregnancy. She did not meet with Ms. H on the 9th July 2008 about her performance. The claimant stated that she got on well with all of the clients and she believed she was performing her role brilliantly. Ms. H had regularly told the claimant that she was doing a very good job. The claimant did not receive any verbal warnings during the course of her employment. The claimant was not asked to attend a meeting with the respondent until after she informed them of her pregnancy. The claimant stated that any sick leave she had taken was certified. No issues regarding her leave were raised with the claimant prior to the 25th July 2008.

At the meeting of the 25th July 2008, Mr. H informed the claimant that she would have to achieve a target of €8,500 per month. The claimant asked Mr. H if he could demonstrate where he had achieved this target in the past but he said she was not entitled to that information. The claimant enquired what the figures were derived from but she did not receive this information. At the end of the meeting the claimant was very distressed. Mr. H said "no fees, no wages". It was a mutual decision to terminate the meeting. The claimant received a letter from both Mr. H and Ms. H after this meeting.

Subsequently, the claimant received the handwritten letter from Mr. H dated 27th July 2008. When the claimant read the letter she believed that Mr. H wanted to destroy her career. She was very upset by the letter. The claimant submitted medical certificates to the respondent from her doctor and sought legal advice on the correspondence she had received. The claimant believed herself to be dismissed by Mr. H because she was pregnant. The claimant gave evidence pertaining to loss.

During cross-examination it was put to the claimant that Ms. H held meetings with her on the 10th March, 29th April, 6th May 2008, 27th May and 24th June 2008. The claimant did not accept that Ms. H held meetings with her on those dates. It was put to the claimant that a further meeting occurred on the 9th July 2008. The claimant replied that it was not a meeting as such but Ms. H did enter the claimant's office. The claimant stated that she had produced the list of the 10th July 2008 in response to issues that she had raised with Ms. H on the 9th July 2008 and to show a list to Ms. H of invoices she wished to send. It was put to the claimant that she was asked on the 9th July 2008 to produce a full list of work that she had done. The claimant stated this was untrue.

The claimant denied telling members of staff that she had given her notice. It was put to the claimant that she had sought a cheque for her wages mid-month as she intended to leave her employment. The claimant replied that she had she received a cheque for wages at irregular intervals and she was often paid for a number of weeks at a time.

It was put to the claimant that she had removed personal items from her office after the meeting of the 25th July 2008. The claimant stated that she did remove some items as she was in a frenzy after the meeting. Mr. H's words and body language indicated to the claimant that he did not want to work with the claimant again and she felt she had been sacked when she exited the meeting. It was put to the claimant that the work sacked or dismissed had not been used at the meeting of the 25th July 2008. The claimant replied that Mr. H had told her that she must accept the target that he was imposing on her. The claimant was supposed to achieve that target even though she would be on annual leave during the following month. The claimant then received the letter of 27th July 2008 from Mr. H.

The claimant's husband gave evidence that he attended the meeting of the 25th July 2008 and he confirmed the claimant's recollection of the meeting. An altercation occurred between the claimant's husband and Mr. H which the claimant's husband to make a formal complaint against Mr. H.

Determination:

Having heard all the evidence put forward by the respondent and the claimant, the Tribunal determines there was an unfair dismissal. The Tribunal is further satisfied there were no issues relating to the competency or performance of the claimant raised prior to the 23rd July 2008 when the respondent was notified of the claimant's pregnancy. A meeting was hastily convened for the 25th July 2008 at which the first identifiable signs of an issue regarding the claimant's competency was raised, after the claimant had informed her employer of her pregnancy. The Tribunal is satisfied that the claimant was dismissed by virtue of her pregnancy, as there was no evidence of any meetings held with the claimant prior to the 25th July 2008 pertaining to her competency or performance.

The Tribunal further notes that the respondent failed to follow good industrial relations practices in dealing with any perceived issues relating to competency and performance that may have arose during the employment.

The Tribunal awards the claimant compensation in the sum of €20,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)