

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE **-claimant**

UD470/2009

against

EMPLOYER **-respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Sligo on 20 January
and 8&9 March 2010

Representation:

Claimant: Mr. Brian Gill, Callan Tansey, Solicitors, Law Chambers,
3 Wine Street, Sligo

Respondent: Mr. Eamonn McCoy, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

This being a case where the claimant had tendered her resignation and dismissal is disputed by the respondent, it fell to the claimant to make her case.

The claimant, who had previously completed a Business Studies course before taking up a position with a telephone service provider, was employed as showroom manager in the respondent's Sligo store (the store) from 18 June 2007. Before moving to the store the claimant underwent a six-week period of training in one of the respondent's Dublin stores. The claimant reported to the store manager (SM) and was part of a management team including the trading manager (TM) who was effectively the assistant store manager and two service managers. The claimant had four staff reporting to her, including a team leader. On occasion, she was the duty manager for the shift when

all sales staff reported directly to her. The claimant worked a 42-hour week, which included weekends.

At the outset the working relationship between the claimant and SM was good. According to the claimant this relationship changed some time during the autumn of 2007 when SM began to discuss personal matters with her in regard to the length of her relationship with her boyfriend and the level of trust in the relationship. Around this time the claimant came to work on a Sunday dressed in a tracksuit in order that she might do some painting work on a part of the showroom.

The following day the claimant asserts that she received a text from SM asking her to come in early for work to discuss uniforms. When the claimant arrived SM said that after he had seen her on Sunday wearing the tracksuit he realised “what a good body she has and that she should be using it more in her position”. SM asked the claimant to stop wearing the company uniform and if she started wearing skirts with high heels she would find that it would be more advantageous to her for interacting with both staff and customers. SM told the claimant he had spent the Sunday evening driving home thinking about her uniform and changing what she wore.

The respondent’s position is that no such text was sent to the claimant and the matter of dress for work came up in the context of the claimant having a problem getting a member of staff to take direction from her and SM was trying to boost the claimant’s level of confidence which he felt would be beneficial to the claimant. SM told the Tribunal that his comments were about the claimant’s legs and not her body. The evidence of the human resource business partner (HR) of the respondent, effectively the human resource manager for the respondent’s fifteen stores, supports the claimant’s contention that her body and not her legs were referred to.

Approximately two weeks later, during a promotional event day organised for the store, the claimant and TM, who did not give evidence to the Tribunal, were in SM’s office checking the sales figures for the promotion. At that point in the day they were all disappointed because the figures were low. The claimant’s position is that SM told her she should go onto the shop floor and ‘get your tits out.’ The claimant spoke to TM about this incident and told him there had been a few other incidents like this regarding her uniform and told TM how uncomfortable she was feeling. TM, shocked at the remark, advised the claimant to contact HR and gave her the phone number. The claimant was not aware if TM informed SM of their conversation. The claimant had also spoken to a Manager (OM), from another of the respondent’s stores, about her problems with SM. OM re-iterated what TM had said confirming it should not be happening and if it continued she would have to raise the issue.

The claimant’s position (which was contradicted by SM), is that her relationship with SM deteriorated from this point, he started ignoring her, stopped referring to her as a member of management at meetings or in general, he stopped referring to her when the staff were informed which managers would be on duty. If the performance was poor in the showroom the claimant was singled out by SM and blamed, even though the sales figures were exactly the same as when she started working for the respondent.

In late November 2007 the claimant informed SM that she was pregnant. Her position, (which was contradicted by SM), is that during this conversation SM asked the claimant ‘what contraception were you using’ and asked if she had ‘become pregnant deliberately.’ He asked the claimant in an aggressive tone what she ‘intended to do about it,’ the claimant understood this to mean he was asking her if she was planning an abortion. SM asked the claimant if she had noticed how poor their relationship had become and told the claimant that due to her talking to other managers she

‘could have cost him his job and his marriage.’ The claimant told SM that she needed her job and she wasn’t going to leave because of him.

As a result of SM telling HR of his upset, and on becoming aware from another unnamed manager of the claimant’s allegations, HR visited the store in the middle of December 2008. She stated she had been concerned for SM as he was so upset when he spoke to her on the phone, and offered him the option of taking a grievance against the claimant. On her arrival in the store HR spoke first to SM who told her that he had told the claimant she had a great body and should wear business clothes to show it off better. This was in the context of the claimant having a problem because of her lack of confidence in getting a junior colleague to take instructions. HR, who was quite shocked and surprised at what she heard, told SM that his comments were wholly inappropriate to make to a female colleague. HR felt that SM’s comments were honest and that he was genuinely trying to help the claimant.

HR then spoke to the claimant and began by discussing the colour of her uniform. The claimant wore a black shirt whereas HR expected her to wear an orange shirt. The claimant’s explanation was that black shirts were worn in the store in which she had begun her training. HR then addressed the issue of SM’s comments. The claimant was surprised, as she had no idea how HR was informed of the situation and had made no complaint at this stage. It is the respondent’s position that no reference was made to the “get your tits out” remark. HR suggested that by his remarks SM was just trying to ‘build her confidence’ and that the claimant had misinterpreted his comments. At no stage did HR offer her the option of taking a grievance against SM.

HR then brought SM and the claimant together whereupon it is the respondent’s position that SM apologised to the claimant. It is common case that HR told them both that they had to continue working together and that they agreed with this. The claimant’s position is that she had no choice in this and had to agree. HR took no further involvement in the situation and did not return or monitor the situation in any manner.

Towards the end of January 2008 the claimant suffered a miscarriage and was out of work for a number of weeks. During her absence the claimant received regular phone calls looking for weekly medical certificates. SM requested an official letter from the hospital to state specifically that the claimant had suffered a miscarriage. Following the claimant’s return to work on 25 February 2008 she requested that she would be re-deployed within the store. The claimant was willing to be demoted to team leader to facilitate her request. The reasons for this request were that she was under a lot of pressure from SM, her working relationship with SM was intolerable, she had no support in her role and she was being undermined in front of her staff. If her request was facilitated the claimant knew she would be ‘away’ from SM even though it meant taking a reduction in salary. The claimant felt this was all she could do to ‘stay out of the firing line.’

SM told the claimant that she had to resign her position as Showroom Manager with the respondent in order to take up the new position of team leader. As a result the claimant gave her notice to the respondent to resign and expressed her interest in the team leader position. Interviews, conducted by a manager from a different store, for the team leader position were arranged and on the day of the claimant’s interview the claimant became distressed at customer relations issues raised with her by SM. It is the claimant’s position that during these discussions SM suggested that matters might turn disciplinary and he was going to contact the respondent’s human resource advice line (the advice line) for advice on how to proceed. As a result her interview had to be postponed. When the claimant was later interviewed for the position of team leader she, along with all other interviewees, did not meet the criteria for that position and was unsuccessful. She then reverted to her position as

showroom manager.

The claimant asserted that when she stepped out of the store for a few minutes without clocking out as all the managers did, SM called her to his office and said that if she ever did that again she would be subject to disciplinary proceedings. SM said the other managers did '10 times the amount of work' done by the claimant and that was why they could step outside without clocking. SM typed up a disciplinary warning letter to the claimant but did not issue it and just left it on the system for all the respondent staff to see and have access to. The respondent's position is that while a disciplinary letter was prepared it was in no way accessible to other staff members being protected by SM's own password. The claimant never had any official disciplinary warnings only a verbal warning from SM where she claims he said; "all my issues will add up and make a case of Gross Misconduct against you."

In August 2008 SM wanted to investigate the claimant for giving a discount on a kitchen. SM was aware the claimant had given this discount as was standard practice but the paper work had gone missing. Another manager had approved the discount for the claimant and passed all the paperwork to SM. The claimant queried with SM why another manager had given an even bigger discount without any paperwork to back it up but was not being investigated. SM told the claimant "if you're that bitter and want to pursue it contact you'll have to contact HR because I won't." The claimant said she was not having any part of the investigation, as it wasn't fair and only responded with brief answers, as she did not trust SM to recall or record what she said accurately. The claimant was never given a copy of the notes.

The claimant feared that everyday she would arrive for work and be handed her P45. The advice line informed the claimant that a senior human resource manager would have to dismiss her; it was not in SM's power to do so. The claimant told the advice line how SM was getting other managers into the store to judge her work. The claimant's position is that the advice line, which is based at the respondent's parent company in the UK, told her they would contact HR and they could have a meeting in private to discuss everything. HR never made contact with the claimant and the next time they spoke was after she had submitted her resignation. The respondent's position is that it is not the function of the advice line to seek to involve HR in particular issues and indeed HR never received contact from the advice line about the claimant.

SM told the claimant that he thought her performance was so poor he had spoken to the regional manager about it and they both no longer wanted her as showroom manager and it would be advisable if she looked for an alternative job. It upset the claimant that SM was now discussing her work with all other managers and telling her none of them wanted her there anymore. The claimant went on sick leave but received a phone call from SM. The claimant contacted the advice line that informed her she did not have to speak to SM directly so the claimant was in contact with a different manager and posted in medical certificates. The claimant was on certified sick leave from 29 August 2008 citing stress; she submitted her resignation on 28 September 2008 and gave the respondent a medical certificate to cover her four-week notice period. Her employment ended on 28 October 2008. The claimant stated she had raised the issues which led to her resignation over the previous six months and did not see them being resolved.

The claimant attended an exit meeting with HR and a manager from another store on 15 October 2008. They went through all the claimant's issues in detail and HR informed the claimant that the advice line had never contacted her. Once HR had turned her back on the claimant the advice line was all that was left. HR never told the claimant why she didn't contact her after the meeting in SM's office.

The claimant contended her health had been severely affected as a result of working for the respondent. The impact has been so severe the claimant still has nightmares. The claimant says she has been left in fear of working in case the same situation occurs and this happens again. The claimant felt she had to resign as her physical and mental well-being was so damaged.

Determination

This is a case where the claimant alleges what is commonly known as “constructive dismissal”. The Unfair Dismissal Acts 1977 to 2007 (hereafter referred to as “The Act”) do not refer to such a term, but section 1 of the Act inter alia defines dismissal as;

“(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”, and section 6 (7) of the Act states;

“(7) Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so— (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal...”

The Tribunal is satisfied that SM made inappropriate remarks to the claimant during the autumn of 2007. These remarks were unwelcome and could reasonably be regarded as sexually offensive, humiliating or intimidating. It is not necessary for the Tribunal to determine the intent behind those remarks. The Code of Practice on Sexual Harassment and Harassment at Work, which has been given statutory effect by the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002) states

“The intention of the perpetrator of the sexual harassment or harassment is irrelevant. The fact that the perpetrator has no intention of sexually harassing or harassing the employee is no defence. The effect of the behaviour on the employee is what is important”

After hearing SM’s evidence the Tribunal did not feel there was any sinister motive on SM’s part in making these remarks. Nonetheless these remarks were entirely inappropriate and entirely capable of being interpreted by the claimant in the manner that she did. When HR became involved, following an approach from SM, and visited the store and discussed the matter with SM she correctly came to the view as to the inappropriateness of SM’s behaviour. However her immediate conclusion, without even talking to the claimant about the matter, was that his actions toward the claimant were honest and that he was genuinely trying to help the claimant. When HR later spoke to the claimant about the issues it is clear that she had already decided that SM’s remarks were meant to help the claimant and that this mindset dictated the way that HR approached the issues with the claimant. HR should have recognised that, potentially, she was dealing with a serious issue of sexual harassment, and at the least should have assessed and taken into account of how the

claimant had been affected by SM's remarks. The Tribunal is satisfied that, in dealing with the issue in the way that she did, HR, rather than remaining impartial, took the side of SM. Once she had dealt with such a serious issue in this informal way she should at the very least, have continued to monitor the situation and give ongoing support to the claimant. However she did not do so and left the claimant without support.

Once HR had dealt with the matter in this way the Tribunal is satisfied that the claimant could have had no confidence in HR's ability to deal with any issues on her behalf. It is clear to the Tribunal that the working relationship between SM and the claimant completely broke down in the months following HR's intervention. While the Tribunal is not convinced that the claimant's health problems are attributable to the respondent, nevertheless the Tribunal is satisfied that this break down in the working relationship led to a situation that was intolerable for the claimant.

While the Tribunal would in most cases expect the claimant to exhaust all possible internal procedures prior to resigning, in the particular circumstances of this case the Tribunal is satisfied that it was reasonable for the claimant to terminate her contract when she did and further that the respondents' handling of the claimant was unreasonable.

The claimant therefore succeeds in her claim under the Act and it being accepted that compensation is the appropriate remedy in this case, and taking all the evidence as to loss and mitigation into account the Tribunal awards the claimant €7,394-00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)