

CLAIM OF:  
EMPLOYEE - claimant

CASE NO.  
UD738/2008  
WT305/2008

against

EMPLOYER - respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony BL

Members: Mr. M. Forde  
Mr. T. Kennelly

heard these claims in Limerick on 17 February, 16 June and 1 September 2009

**Representation:**

Claimant : Ms. Mary Linehan, 46 Hunters Lane, Ballycullen, Dublin 24

Respondent: Ms. Angela Grimshaw, Peninsula Business Services, Unit 3 Ground  
Floor Block S,  
East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

This was a case of constructive dismissal.

**Summary of the Evidence**

The claimant commenced employment as a sales assistant with the respondent in one of its clothes stores in Limerick in September 2006. The employment was subject to a three-month probationary period. The claimant worked as required and was available for work after 6.00pm on Wednesdays, on Saturdays and Sundays and most of the day on Fridays. She signed a contract of employment on 5 December 2006. The position

of the Area Manager (AM) was that he had gone through each part the contract of employment with the claimant at her interview. This was disputed by the claimant. She did not receive her written contract of employment until December 2006. The contract contained a reference to a grievance procedure. The claimant disputed the respondent's assertion that she had been told that it was just a matter of asking for it.

The claimant's position was evidence that from around April 2007 the area manager (AM) called her "Snow White". She complained to the then store manager (SMG) about this but she just laughed it off. Thereafter AM called her "Poisoned Dwarf" and this continued until she left her employment. This embarrassed and humiliated her. AM denied the alleged name-calling. SMG's evidence was that during stocktaking another employee had referred to the claimant as "Snow White" because she, unlike another employee, had been pale-skinned and without tan at the Christmas party. SMG maintained that this was just banter and had been taken in good part by the claimant and that furthermore, photographs of the Christmas party had been displayed on the office wall and were neither removed nor objected to by the claimant

The claimant's position was that in or around July 2007, due to a matter unrelated to work, SMG more or less ignored her for two weeks and either issued instructions to her through third parties or was abrupt when issuing instructions directly to her. This rupture in their relationship was resolved when, following an incident, the claimant confronted SMG. On at least three occasions the claimant was subjected to security checks: her bag and person were checked and she was asked to take off her boots. The respondent is entitled to carry out security checks but to the claimant's knowledge no other employee had been searched.

The claimant's position was that she was promoted to the position of supervisor in October 2007 and the promotion was not subject to a probationary period. However, she had never received the appropriate rate of pay for this position. It was the respondent's evidence that ASM was promoted to the position of acting manager and the claimant to the position of acting supervisor in the store in November 2007 when SMG was transferred as manager to the respondent's other store. The increased payments for the new roles were to be commenced with retrospective effect at the end of a three-month probationary period. ASM maintained that while the claimant and she had originally been good friends this changed when the claimant was promoted to acting supervisor because more was then expected of the claimant and she (ASM) had to ensure that the claimant delivered on this.

On 27 November 2007, following a telephone conversation with ASM on 26 November, the claimant submitted a written request to ASM enquiring as to the identity and contents of the complaint allegedly made about her work by another employee. ASM did not pursue this because the complaint had not been made official and apprised the claimant of this. Some weeks later AM told the claimant that he would deal informally with any complaints and to never again put "anything in writing".

The three witnesses (AM, SMG and ASM) who gave evidence on behalf of the respondent participated in a meeting in early January 2008 where issues relating to the claimant were discussed. These issues included her timekeeping, changing rosters at short notice and failure to complete tasks. None of these issues had been raised with

the claimant prior to this.

On 5 January ASM had entered a list of duties into the shop diary to be completed on the following day, 6 January 2008, and further stated that if these were not done she would be issuing a warning. The respondent's position was that it was the claimant's responsibility to ensure that these duties were completed and she failed to do so.

On Sunday 6 January 2008 SMG (now manager of the respondent's other store) was out sick from work. While out shopping that day she visited the store around lunchtime and saw the claimant at work wearing Ugg boots and a Josef hoodie (contrary to company dress rules) and she was still doing the Friday delivery. SMG telephoned AM to complain about these. SMG was no longer responsible for the store but she acted as a support to ASM. When the claimant went to the store the following Wednesday, 9 January 2008, to check the roster ASM told her, in the presence of another supervisor that AM had instructed her to issue the claimant with a verbal warning for not having completed the unpacking of a delivery on Sunday 6 January and for wearing Ugg boots. The claimant's evidence was that she had been told on a previous occasion not to wear Ugg boots at work but that she had just worn them on 6 January while going out for coffee. The respondent had not afforded her the opportunity to provide any explanation. It was further her evidence that ASM had asked her, as a favour to unpack two boxes, of the Friday delivery but on Sunday the claimant found that there were five boxes to be unpacked. She did as much as she could on the day and only one box was left unpacked. The verbal warning was recorded in the store diary, which was available for all the staff to see. The respondent maintained that only senior staff would see the diary. ASM accepted that she had not followed any procedures; she felt there was no need to investigate the matter once the claimant admitted that she had been wearing the Ugg boots. The respondent admitted that disciplinary sanctions had been imposed on the claimant without affording her the opportunity to answer the charge against her and that it acted in breach of its own procedures.

The respondent wanted to introduce new policies and called a staff meeting for this purpose. The claimant and others could not attend on the first two days (15 & 20 January 2008) proposed for a meeting and as a result she was demoted. She first learned about her demotion from another member of staff. The key to the store was taken from her. The claimant could not attend the meetings because she was respectively in college on the other side of the city at the relevant time and on the second occasion she was on holiday with prior approval.

The policy meeting was eventually held on 26 January 2008 without the claimant in attendance. She was babysitting and could not get transport. The claimant denied SMG's assertion that she refused to come to a meeting arranged for 2 February 2008; her position was that she had not been made aware of any such meeting.

There was a significant drop in the claimant's hours towards the end of her employment. She denied the respondent's assertion that she asked for a decrease in her hours for college related work and examinations and submitted her examination timetable in support of her position. Whenever she needed time off for college she worked up those hours shortly afterwards. The claimant had expected a reduction in her hours after Christmas but not to the level of the actual reduction. In the period 15

January 2008 to her resignation she was getting around seven hours per week and was not allocated any hours during her week's notice. In general she was getting far fewer hours than other part-time staff even though she had the best sales figures. When the claimant raised the issue, ASM informed her that she had been rostered for more hours but that AM had instructed her to reduce them. At her interview with AM in 2006 the claimant had indicated that she would take as many hours as she could get. She had left her previous employment because of insufficient hours. AM denied instructing ASM to reduce the claimant's hours but he did instruct that the extra hours be allocated to the full-time workers. He denied

On 23 February 2008 the claimant handed a letter to AM giving one week's notice of her resignation. In her letter she stated, inter alia: *"It is with regret that I have to take this step. Unfortunately due to the actions and behaviour of management I have been left with no option but to hand in my resignation. Managements' actions have made my working conditions intolerable and they have had a detrimental effect on my health."* Such actions have included: *unfair treatment, unjust treatment, breach of confidentiality, breach of contract, breach of Health and Safety legislation, breaches of dignity and respect at work, breaches of civil rights, defamation, breaches of employment codes of conduct, and inappropriate behaviour and actions of management."*

AM read the letter in her presence and invited her for coffee. When he raised the matter of her letter she did not want to discuss it, as he was one of those about whom she was complaining.

Attempts were made by the respondent to meet the claimant on both 1 & 8 March 2008 to discuss her letter of resignation failed. HRM, who was based in Scotland, accepted the claimant's position that it was inappropriate for her to meet AM because his treatment of her was one of her reasons for resigning. The first of those meetings had been called for the claimant's final day in the employment. A subsequent attempt to arrange a meeting failed because the claimant wanted to have representation at it.

## **Determination**

The claimant a student employed by the respondent as a shop assistant from 30 September 2006. Further on in the employment she was promoted to the role of supervisor. The claimant, being a student, worked when she was available and when work was available. The shop manager posted up a weekly rota. An incident is alleged to have occurred at the Christmas party. The claimant presented for work on January 6<sup>th</sup> 2008 not wearing staff uniform; for which she received a verbal warning from the shop manager. She was subsequently relieved of her supervisory role.

On 23<sup>rd</sup> February 2008 she gave one week's notice of her resignation from her position in a letter outlining 10 reasons why she resigned. She subsequently claimed constructive dismissal.

The Tribunal has to come to a majority decision in this case and the majority finds that, on receipt of the resignation, the respondent by telephone and letter attempted to get the claimant to attend a meeting to discuss her grievances. This was a very genuine and concerted effort by the respondent to get the claimant to attend the meeting and

address the issues advising the claimant to bring a work colleague or a union secretary with her. The claimant chose not to attend the meetings.

The Unfair Dismissals Acts states that an employee can terminate a contract of employment where the contract of employment was such that the employee would have been entitled to or it would have been reasonable for the employee to terminate the employment.

While there were some minor incidents in the employment it did not constitute the claims made in the letter of termination.

The respondent on receipt of this letter did all they possibly could by telephone or letter to get the claimant to attend a meeting to discuss these issues. The claimant chose not to attend such meetings.

The majority finds that the claimant did not satisfy the criteria laid down to succeed in a claim for constructive dismissal.

In her dissenting opinion the chairman accepts the claimant's version of the events herein apart from the evidence in relation to the timing of the claimant's promotion.

Given the confluence of events in early 2008 it was reasonable for the claimant to lose her trust in the management. In light of the manner in which management treated the claimant's earlier complaints her failure to invoke the disciplinary procedure is not fatal to her claim.

This onus of proof in a constructive dismissal case is on the claimant. The chairman finds that onus to be discharged. It is not necessary for the claimant to prove each and every ground on which her claim is based, if the grounds proved entitle her or make it reasonable for her to resign.

By the afore-mentioned majority the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

The Tribunal awards the claimant €38.93 under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)