

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD628/2009
MN640/2009

against

EMPLOYER – *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr P Pierson
Ms H Murphy

heard this claim at Loughrea on 24th August 2010

Representation:

Claimant(s): Mr Patrick Daly
Claffey & Daly Solicitors
3rd Floor, Lismoyle House, Merchants Road, Galway

Respondent(s): Mr John Brennan
IBEC
West Regional Office, Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

As dismissal was in dispute the claimant went into evidence first.

Claimant's Case:

The claimant's employment with the respondent company, a plastics manufacturer, commenced in November 1997. She processed orders over the phone from the company's sales representatives and directly from customers.

When the claimant returned to work on September 22nd 2008 after two weeks' sick leave she was called to meet the Managing Director (MD) and the Financial Controller (FC). MD said he was there to sack the claimant. When she said he couldn't do that he said I can and I can put a nineteen year old in the job. He said it was because of the claimant's sick leave, as he did not believe that she was really sick. Sick leave was not paid in the company.

She contended that she did not receive a letter drafted later that day but she was shown a sheet at the meeting. It referred to the claimant's poor attendance and that improvement was required. She was also requested to work the hours allocated to her when she was present. Her attendance was to be monitored over the next four months.

She was also requested to become proactive in looking for sales. The claimant took exception to this as she worked in sales administration. She considered that this would cause a conflict between her and the sales representatives, as she would now be competing for their sales. She did not receive any guidance on her new role or have any sales targets set for her. There was no pay increase for her new duties.

The claimant asked the MD at least three times after the meeting to clarify what he wanted her to do, but he would not speak to her about it. Each time she went to his office he phoned one of the sales representatives and said the claimant wanted to speak to him.

She believed she was being set up to fail and thought that she would be dismissed after the four months of monitoring had elapsed. She handed in her notice on September 25th 2008.

On one occasion the MD told the claimant that because she left the building for breaks other staff were leaving as well. He believed she was leaving to go home which she denied. The claimant left to get air, as the office was stuffy because it was over a factory floor and had no air conditioning. The MD instructed the claimant to clock out every time she left the building, but when she found out that no one else was clocking out she stopped.

Earlier in 2008 there was an incident with the MD when he had yelled at the claimant and a colleague that they 'did what they liked'. The claimant was under stress at that time and served the MD with one week's notice. She told her Office Manager, MD's son, that she was sick of MD bullying her. He disputed that the MD had been bullying her. After leaving she developed a migraine and went to her doctor. She took sick leave for five weeks'. She sent in a cert for every week.

When she returned in May the MD gave her a letter which stated that it was not acceptable to give one week's notice, stay out for five week's and then decide to come back. The claimant did not reply.

During cross-examination the claimant agreed that she had approached the Office Manager about reducing her working hours and they had agreed on 34³/₄ hours per week. The claimant had to collect her daughter from childcare by 6pm in the evenings. She accepted that she had poor attendance and that she had been spoken to about it. She had received a warning about it and it was going to be monitored over four months.

She disputed that she was only asked to help following up with clients and she did not have to create sales herself. She was not given targets. She asked the MD about this, but she had not been given an answer. She spoke to one of the sales representatives but he said that he didn't want her to be a sales rep as she had her own job.

When she gave her letter of resignation to the MD he said that she didn't have to leave and he denied having threatened to sack her. The claimant told him that she couldn't fulfill the list he had given her. He told her to think about it and she asked again if she had to make sales and he said yes. The claimant's last day was Tuesday October 2nd 2008. The MD suggested that she meet

with the Office Manager the following Monday October 6th to discuss the sales role, which she agreed to do. However on the Monday the MD said the Office Manager was not going to speak to her and he said that 'they want a new Barbie' for the office. To preserve her dignity the claimant told the MD that if they needed cover in the office he could call her.

The claimant gave evidence of her loss. She was not certified ill when she left her employment.

Respondent's Case:

The Office Manager gave evidence that he worked with the claimant daily in the office. The claimant had requested to drop her hours to 30 per week, but the company needed someone to answer the phone on a fulltime basis. They agreed on 34¾ hours per week. There were three office staff, the witness, the claimant and a third member of staff who did administration and paperwork. The claimant processed orders for the warehouse and delivery documents. She was never involved in sales. She did not have enough knowledge of the products in order to sell them.

In May 2008 she was asked to improve her attendance. She was also asked to make calls on behalf of the sales representatives, as he believed that the claimant performed two hours worth of work over the course of a seven-hour day.

He asked her to check customer orders to see if any customers had not made an order for a couple of months. She was to pass this information on to the sales representatives. The claimant had the worst attendance the witness had ever experienced, she had more absences than the rest of the staff combined, and her absences seemed to coincide with school holidays. He spoke to her several times about it. Because of this he could not assign her any projects that required continuity of attendance.

The claimant did not approach the witness during her last days of work regarding her new duties. On the Monday after her resignation the claimant came to the office after 5pm, but she would have known that the witness always left at 5pm. He did not know she was coming to meet him.

During cross-examination the witness contended that he was unaware that the claimant contended that she went to the office at 11am on Monday 6th October 2008. After she left her employment the witness realised how little work the claimant had performed. Her work is now shared between him and the remaining office staff member. The claimant was not replaced. The company did not have a stated grievance or disciplinary procedure.

The MD gave evidence that when he met the claimant on September 22nd 2008 they discussed her absenteeism and he informed her that he intended to review her attendance in four months time. He did not ask the claimant to get sales. He wanted her to assist the sales representatives who were on the road by checking customer orders. The claimant's predecessor used to set up calls for the representatives and notify the representatives if a customer had not ordered in a while. He believed the extra task was self-explanatory, but that if she needed more information she should have asked the sales representatives. He did not recall suggesting the claimant meet with the Office Manager.

The MD denied making a comment about the office staff wanting a new 'Barbie'. He said he wanted a new effort from the claimant. She was absent a lot and he believed she used her 15-minute coffee break to go home and put the lunch on. He would tap his watch if he saw her coming back late. Others started to take longer coffee breaks and so he told the claimant that she would have to clock in and out. He wasn't trying to bully the claimant he was just trying to keep

discipline within the company. He did not want the claimant to leave, but they parted on good terms. He believed she wanted to leave.

During cross-examination he contended that he never said the claimant's job was on the line. He just asked her to help more. The sales representatives were in the office everyday and she had many opportunities to speak to them.

Determination:

Dismissal in relation to an employee is defined in Section 1 (b) of the Unfair Dismissals Acts as the termination by the employee of his/her 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.

In advancing a claim for constructive dismissal an employee is required to show that he or she had no option in the circumstances of her employment other than to terminate his or her employment. In effect the relevant section reverses the burden of proof for an employer set out in Section 6 (1) of the Act.

The Tribunal is of the view that the claimant's principle grievance was her view that there had been a fundamental change in her role in the company. The claimant asserted that she was being asked to move into a sales role and that in pursuance of this change she sought clarification from the MD on three occasions. The claimant further asserts that although she had previously suffered from a stress related illness on the date of her departure, October 2nd 2008, she was not suffering from a stress related illness.

Although the respondent company conceded that no grievance procedure existed it is clear that the claimant did not work or endure the period of four months proposed by the MD on September 22nd 2008. In this respect the claimant's precipitate departure from her employment clearly fails to meet the requisite threshold and a claimant's obligation to exhaust all remedies so as to demonstrate that she he had no option but to terminate his / her employment. Accordingly, the claim under the Unfair Dismissals Acts fails.

As the claimant voluntarily left her employment the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)