

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE *-claimant*

CASE NO.  
UD806/2009  
MN839/2009

Against

EMPLOYER *-respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr J. Killian  
Mr J. Flavin

heard this claim at Tralee on 13th April 2010

#### **Representation:**

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Claimant: Ms Katie O'Connell B.L. instructed by O'Donovan Murphy & Partners, Solicitors,  
The Quay, Bantry, Co. Cork

Respondent: Ms Faye Revington B.L. instructed by Gerald Bailey & Co., Church Place, Church  
Street, Tralee, Co Kerry

#### **Respondent's Case**

The respondent is a sole trader who owns and along with his son, operates a bar and a garage with a shop. The claimant commenced employment as a bookkeeper with the respondent on 18 October 2001. The respondent has 50 employees – the respondent is responsible for 25 of these and his son (SM), who manages the shop, is responsible for the other 25 employees including the claimant. Most of the staff has worked with the respondent for over 35 years.

SM and the office manager (OM) had a good working relationship with the claimant up to around two years before her dismissal when working with her became difficult. A clocking-in system was introduced at that time but the claimant would not clock in despite many discussions about it with her. Between time off and sick leave she was frequently absent from the office, including twice earlier in 2008, and did not submit medical certificates even when absent for a number of weeks. SM did not refer her to a doctor as he felt it would be intrusive. During one of her absences, work for other companies/bodies, unrelated to the respondent's business, was found on the claimant's office computer. They were flexible and lenient with the claimant as they were aware that she had some domestic problems. On a number of occasions she told OM, "*I don't need the money but I need the job.*" OM understood this to mean that she needed the job for

therapy. During one of her absences she telephoned OM at home one evening to say that she would understand if they got someone else.

By the end of July 2008 the claimant had taken all of her annual leave and returned to work. In early August she informed SM that she was leaving the job, saying that she 'did not need the money' but she did not indicate a termination date. Having worked two weeks in August she cleared all her personal items from her desk and did not appear for work on 18 August 2008. SM did not know her plans. A day or so later she telephoned the respondent requesting two extra weeks holidays but this was refused because August is a very busy time in the business. The claimant did not return to work or make any further contact but her brother informed the respondent that she would not be coming to work.

On around 20 & 23 August the claimant was shopping in the respondent's premises. On 29 August she telephoned OM to say she did not know when she would return to work because she 'wasn't feeling up to it' and told him she was suffering from anxiety. There was work to be done and SM needed some indication of her intentions so on 17 September 2008 the respondent wrote to the claimant as follows:

*"It has been August 15<sup>th</sup> 2008 since you presented yourself for work.*

*In the event that you do not present yourself for work within the next five working days of today's date I will have no option other than to terminate your employment.'*

The claimant sent a text in reply indicating her outrage at receiving the letter but did not indicate when she would return to work. In a letter dated 18 September sent to the respondent the claimant's solicitor sought the withdrawal of the threat of dismissal and an apology by return. SM was unclear as to whether a sick certificate was enclosed with the solicitor's letter. Neither the respondent nor SM were aware of the nature of the claimant's illness. On 24 September the claimant was on a premises owned by a member of the respondent's family. On 3 October the claimant telephoned the respondent to inform him that she could not say when she would return to work and suggested that he employ someone to cover her absence but the respondent did not consider this to be an option as they did not know when she would be resuming work. On 8 October the claimant dropped in Social Welfare forms for the respondent to sign. On 11 October the claimant was in the respondent's shop again but gave no indication as to when she might return to work. Work was not being done and SM could not continue with the uncertainty around the claimant's position. The respondent felt that they had been too accommodating and that they should have drawn the line with the claimant much earlier; she had become "a law unto herself" and erratic and they could not handle her anymore. By letter dated 13 October the respondent dismissed the claimant, stating inter alia:

*'It is with regret that we must furnish you with notice of termination of your employment however given your periodic and lengthy absences from work and lack of response to our solicitor's correspondence we do not have any other option other than to terminate your employment.'*

*You are entitled to a statutory notice period of four weeks and as such this letter shall constitute the commencement date of said notice period and your employment will officially terminate on the 10<sup>th</sup> November 2008.*

On 16 October 2008 a further letter of dismissal was sent to the claimant giving 13 November 2008 as the date of dismissal. The respondent did not have a disciplinary or grievance procedure in place but according to the respondent the staff know what they are supposed to do.

The respondent had not issued the claimant with any warnings regarding her failure to clock in or her absences. Nor had the respondent confronted her regarding the work on her computer for third parties. They did not ask the claimant to produce medical certificates at any stage because they were aware of her problems at home. The claimant was not paid during her absences; this is the policy for newer members of staff.

### **Claimant's Case**

The claimant believes she was dismissed because of her absence due to being unwell. She had been on sick leave on previous occasions and had not received any warnings. When she informed the respondent that she could not return to work he replied that he could not run the office without her and would have to get someone else. She had suggested that working at home would be an option but this was not acceptable to the respondent. The claimant received the letter requesting her to come back to work or otherwise she would be dismissed. The work for third parties found on her office computer had been done during her lunch break. It was a colleague and not SM who had asked her to clock in. She could have returned to work in December when she was informed that her test results were negative. The respondent never requested her to undergo a medical examination. She had been actively seeking employment since January 2009. The claimant could not recall why she removed all her personal items from her desk. She had informed the respondent about the lump she had discovered.

### **Determination**

It was unclear from the respondent's evidence whether the letter from the claimant's doctor had been included with her solicitor's letter of 18 September to the respondent. However, having received the solicitor's letter the respondent, at the least, was on notice that a medical certificate/letter in relation to the claimant was in existence. Instead of contacting the claimant or inviting her to a meeting, to establish her position as regards her work, the respondent dismissed the claimant. The respondent failed to apply fair procedures or any procedures prior to dismissing the claimant and in particular it failed to afford her the opportunity to put her case to the respondent, which is a fundamental principle of natural justice. Accordingly, the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal feels that the claimant adopted a casual approach to work and to her employer and in so doing she contributed to her dismissal. Having taken that contribution into account the Tribunal awards the claimant the sum of €8,125.00 as compensation under the Unfair Dismissals Acts, 1977 to 2007.

The claimant received her statutory entitlement to notice of her dismissal. Accordingly, 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)