

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

-claimant

CASE NO.
UD124/2010

Against

EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Ms M. Sweeney
Mr J. Flavin

heard this claim at Cork on 17th November 2010
and 2nd February 2011

Representation:

Claimant: Ms Cliona Kenny, Ernest J Cantillon & Co, Solicitors, 39 South Mall, Cork

Respondent: Ms. Antoinette Vahey, Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

The claim under the Unfair Dismissals Acts, 1977 to 2007 was one of constructive dismissal, accordingly it fell to the claimant to make her case.

Claimant's Case

The respondent employed the claimant in April 2004 as a deli assistant in the respondent's supermarket. The claimant had no difficulties in her working life until a new fresh food manager (AT) transferred to the respondent in 2007, with responsibility for supervising the claimant and her work.

AT would shout and criticise the claimant on a regular basis; every 2 weeks from his commencement culminating in the incident of the 12th of May. This behaviour would often occur in front of customers further humiliating the claimant.

The claimant attended work one morning and was informed that another member of staff was now taking her position on the deli counter and her position was transferred to the kitchen. The claimant rang the manageress (F) who instructed her to wait on the premises until she arrived to speak to her. F was late so the claimant went home and rang her.

A meeting was arranged with the store manager (TH), AT and F to discuss the situation. At this meeting TH told the claimant that she was 'like a spoilt child that threw their toys out of the pram.' That statement demonstrated the attitude the management had towards her issues; she felt that they were unwilling to listen to her complaint so she continued working as normal.

On the 12th of May the deli was very busy and short staffed. The claimant was both making sandwiches and serving at the deli counter. AT had given out to the claimant about the contents of a sandwich earlier that morning and again approached her at 1.30pm asking 'where's the sandwiches.' The claimant replied that she was serving a customer and then she would get the sandwiches out to the fridge. The claimant finished serving the customer and proceeded to put all the sandwiches in the fridge. TH met the claimant at the fridge and said 'you've done it again; you've missed the boat.' This statement implied that the lunch rush was over and the claimant had left the pre-made sandwich fridge empty; the fridge was not empty. AT asked the claimant 'is the job getting too hard for you,' the claimant replied, visibly upset, that it was not. The claimant said to AT 'if you want to fire me, fire me.' This was the final straw for the claimant. The claimant did not speak to AT again, she finished her shift and went home very upset. After attending her GP that evening the claimant was certified unfit for work.

The following day the claimant's husband went to the store with a letter of complaint and handed it to AT. The letter stated that, '(the claimant) arrived home in a distressed state due to your constant verbal and "bully boy" tactics.' The letter also highlighted general bullying and harassment rules. The claimant was aware of the staff handbook and believed that the management would speak to the person accused of the bullying.

As a result of this letter a meeting was arranged with HR (MoC). The claimant was informed that AT and TH would also be attending the meeting. This upset the claimant so she told MoC that she did not want either of them present at the meeting; they did not attend. The claimant described the incident of the 12th of May and presumed they would contact AT in relation to same and then revert to her with the outcome after she returned from her holidays. The claimant informed MoC that she was suffering from stress as a result of the persistent bullying.

From the 12th of May the claimant was on certified sick leave. The claimant returned from holidays but was not contacted by the respondent with the outcome of the meeting. The claimant contacted HR on the 19th of June, as she had not been paid her weekly wage; HR did not mention the outcome of the meeting.

The claimant was requested to attend a company doctor and complied with this request. The claimant engaged with the respondent in trying to resolve the issues and never walked away when management approached her about the issues. The claimant did not raise the issue during her assessment prior to the 12th of May as she was trying to remain positive about her working life.

The claimant met with the investigator the company appointed; the report issued on the 19th of August 2009. The claimant's representative wrote to the respondent and pointed out the difficulties with the investigative process,

- The Terms of Reference were not followed
- The Investigator had unilateral access to the Respondents Solicitors
- Fair Procedures were not upheld
- No provision for an appeal

By letter of the 28th of October 2009 this report was deemed to be the final report despite the claimant's objections and submissions on the matter.

The claimant requested a Social Welfare Form to be signed by the respondent in September. The form stated that the claimant was out of work due to Bullying and Harassment in the workplace. The respondent refused to sign this form.

The claimant loved her job and would have loved to go back to work if the situation had been resolved. The claimant was claiming illness benefit from Social Welfare but after the Social Welfare Doctor assessed her, she had to resign in order to claim job seekers benefit. The claimant gave evidence of her loss.

Respondent's Case

The store manager (TH) gave evidence. A meeting was called in September 2007 as a result of the claimant leaving work unscheduled after speaking to AT. The claimant felt that she had been replaced. The meeting was intended to be constructive. TH did say 'we can't throw the toys out of the pram when we don't get our way' in relation to the claimant's difficulty in taking instruction. The meeting ended amicably.

On the 12th of May an incident occurred between AT and the claimant. TH also met the claimant at the fridge while she was putting the sandwiches in it at 1.45pm. TH said, 'we've missed the boat with lunch,' she said she was doing the best she could. TH told her that he could organise some help for her then she ran away. TH did not follow her as he felt it would not help her at that point. TH is surprised that the claimant does not recall that he was present during the conversation with AT at the fridge. TH received a phone call the following day from AT informing him of the letter from the claimant's husband and confrontation they had in the store.

The fresh food manager (AT) gave evidence. The store was very busy in 2007 and in particular the deli. All the staff were hired as 'deli assistants', they could do any role within the deli and were often moved around. The claimant was informed that the new member of staff was there to help her but she believed she was there to replace her. The claimant had difficulty in taking instruction from her supervisors and did not react well to any type of change. A meeting was arranged to resolve the claimant's problem, it was explained to her that everyone needs to work together; it was a productive meeting. Between September 2007 and May 2008 AT does not recall any particular incidents with the claimant other than normal everyday issues. The claimant took offence when AT asked her to do anything.

On the 12th of May 2008 AT raised an issue regarding stock cards. At 8.20 AT asked to speak to the claimant. AT instructed the claimant to keep the fridge stocked with sandwiches at all times and stressed the importance of stock cards. The same day AT saw that the fridge was empty of sandwiches at 1.45pm and said to the claimant, 'we missed the boat again,' the claimant replied, 'if you want to fire me, fire me.' AT said, 'that's not the case' and, as the claimant was crying asked if she was finding it tough; the claimant walked out of the store.

On the 13th of May AT was approached by the claimant's husband and handed a letter. The claimant's husband proceeded to rant at AT to the point where he had to ask him to leave the store.

The HR officer (MoC) for the respondent gave evidence. MoC was aware of the letter the claimant's husband sent to both AT and the respondent owner. A meeting was scheduled with the

claimant in order to resolve her issues. During the course of that meeting the claimant insisted that AT was ‘a nice guy’ and that she wanted to resolve the issue she had. At the meeting the claimant said she did not want to move to an alternative respondent location, she did not want to speak to AT and did not make a decision on whether she wanted to make a formal complaint against AT. MoC asked the claimant to contact her when she had made a decision on how she would like to move forward. The minutes of this meeting were not sent to the claimant immediately. The claimant was not given a copy of the grievance procedure at this meeting. The grievance procedure is displayed in the canteen and the claimant had previously taken a grievance against a member of staff so was aware of the procedure.

MoC spoke to the claimant regarding her entitlement to sick pay in June but as the claimant did not bring up the issue, MoC felt it was inappropriate and would be pressurising the claimant if she asked her for a decision on whether she wanted to make a complaint. MoC asked how she was and the claimant said she was still stressed. MoC did ask the claimant if there was anything other than the sick pay she wanted to talk about but the claimant said no, it was only the sick pay that confused her.

The claimant requested that the respondent signed a Social Welfare form stating that she was off work due to bullying. The respondent would not sign this form and rang the claimant asking her to come into the respondent and that they would investigate the bullying allegation if that was her decision. The respondent wrote to Social Welfare outlining this position. MoC wrote to the claimant on the 19th of January 2009 requesting that she contact her, as they were concerned with her continued absence from work. There was no response to this letter so on the 10th of March the respondent requested that the claimant attend the company doctor.

The owner of the respondent (LR) gave evidence that he offered to meet with the claimant to try and resolve the issue. By letter LR stated, ‘ We have yet to receive any official complaint directly from (the claimant) and cannot proceed with any procedures until we do so.’

Determination

This case came before the Tribunal as one of Constructive Dismissal, therefore it fell to the claimant to make her case. There was no formal allegation of bullying made by the claimant despite numerous invitations to do so by the respondent. The Tribunal are not satisfied that there was sufficient evidence of bullying and find that the claimant did not meet the burden of proof required, therefore failed to meet the threshold for a constructive dismissal. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)