

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

**CASE NO.**

EMPLOYEE - claimant

UD2367/09

**Against**

EMPLOYER - respondent

EMPLOYER - respondent

**under**

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. R. Maguire B.L.

Members: Mr P. Pierce  
Ms E. Brezina

heard this claim at Dublin on 7<sup>th</sup> February 2011, 10<sup>th</sup> May 2011 and 11<sup>th</sup> May 2011.

#### **Representation:**

Claimant: Mr. John Connellan, Carley & Connellan, Solicitors, 10 Anglesea Street,  
Dublin 2

Respondent : Ms Catherine Day, Peninsula Services (Ireland) Ltd., Unit 3 Ground Floor,  
Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:-

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

The respondents (ST and RL) are occupational therapists engaged in vocational assessments. They are a business partnership and share the costs of running the building and paying a full time secretary.

The claimant was interviewed for the position of secretary and signed a contract of employment on 30 March 2007. Her employment commenced on 11 April 2007.

The claimant's probationary period was extended until September 2007 when she was made permanent.

At the end of August 2008 a decision was made to give the claimant a pay rise effective from early September 2008. ST regarded punctuality as important and spoke to the claimant on 2<sup>nd</sup> September about her lateness over recent days and the claimant promised faithfully to be on time the next day.

The next day the claimant was again late for work and ST firstly spoke to her and then RL. The claimant started screaming at ST and lost her temper. They said they would speak to her later that day. They sought advice and when they spoke to the claimant again later about her timekeeping and behaviour they also told her that her pay rise would be postponed and reviewed again on 17<sup>th</sup> October 2008. ST went on holidays then, as did the claimant.

ST took charge of paying the claimant by cheque each Friday and in ST's absence on 12<sup>th</sup> September 2008 RL gave her pay cheque. Their Accountant prepares the payslips and sends them directly to ST. In ST's absence the claimant opened ST's post, including the letter, which contained the payslips. When she received her pay cheque from RL she noticed that the cheque did not correspond with her payslip. The claimant told RL he was breaking the law. RL felt intimidated and wrote a cheque to rectify the matter.

RL discussed this matter with ST on her return from holidays. The claimant did not seem to understand that her pay rise had been postponed and they decided it was necessary to put this in writing to her.

They attended a meeting with the claimant on 22<sup>nd</sup> September 2008 and discussed her behaviour on 3<sup>rd</sup> September 2008 and the postponement of her pay rise due to her behaviour and timekeeping and RL also discussed the confrontation he had with the claimant on 12<sup>th</sup> September 2008. A discussion ensued over the claimant's inappropriate behaviour and the morale in the office and they wanted the claimant to know the gravity of the situation. They did not want to take disciplinary action as the claimant had threatened going the constructive dismissal route and a court case.

By letter dated 16<sup>th</sup> October 2008 the claimant was informed that her pay rise of €2,240.00 was granted and backdated to 1<sup>st</sup> September 2008.

The respondents met the claimant on 20<sup>th</sup> October 2008 and they told her they were happy with her punctuality. The claimant became angry when they discussed medical appointments during office hours and said she was leaving. The claimant was subsequently absent on sick leave the following three days.

So as not to inflame the situation the respondents sought advice from a HR organisation on how best to manage the claimant. The claimant was absent from work from 21<sup>st</sup> October 2008 until 27<sup>th</sup> October 2008 due to stress. In order to develop a process to resolve current developments the respondents wrote to the claimant on 23<sup>rd</sup> October 2008 and asked her to list her grievances in writing. The respondents tried not to upset the claimant and did not want to overload her with work. ST typed up some of her own reports at home and RL hired a temporary secretary to type up some of his reports in the evenings rather than receive criticism from the claimant.

The claimant subsequently outlined her grievances. Among her grievances were that she was not treated with respect and consideration, that demeaning and belittling comments were made to her and that she was being bullied. ST spoke to the claimant about her grievances and the claimant was happy to leave well enough alone. The respondents are not bullies and not confrontational people but are problem solvers.

Everything was fine and gifts were exchanged at Christmas 2008 and the claimant received her Christmas bonus.

In January 2009 the claimant suffered ill health and was absent from work, had a family bereavement in February 2009 and she had to take care of the funeral in England. The claimant returned to work on 9<sup>th</sup> March 2009. The respondents did their best to have a stress free office and to make the claimant feel welcome. For the following few weeks she was not performing well at work. She was forgetting to pass on messages, which impacted on the respondents. On 27<sup>th</sup> March 2009 the claimant became angry again when ST spoke to her about a referral that had not been dealt with. The claimant became angry again when RL spoke to her in the afternoon. Her temper was irrational and uncontrolled.

The claimant was again absent on sick leave from 30<sup>th</sup> March 2009 but also wrote a letter that day in which she suggested that mediation would be the most sensible option to deal with all issues. RL wrote to the claimant and invited her to a meeting to address the allegation of bullying and hear her grievances on 8<sup>th</sup> April 2009.

A new contract was drawn up in April 2009 together with an employee handbook. The claimant refused to sign the new contract.

The claimant contended that she was not medically fit to attend the meeting on 8<sup>th</sup> April 2009. The respondents were concerned that she was not medically fit to return to work and on three occasions organised an appointment for the claimant to be assessed by an independent doctor.

The claimant asked to meet the respondents on 24<sup>th</sup> April 2009. No agenda was prepared in advance as the respondents wanted to hear what the claimant had to say. The claimant suggested that she be made redundant and there would be no question of her taking a constructive dismissal case against them. It was explained to the claimant that there was no redundancy situation as the position was still there.

The respondents decided to proceed to a medical capability hearing without the benefit of a doctor's report. This was arranged for 12<sup>th</sup> May 2009 and was re-arranged for 20<sup>th</sup> May 2009. The respondents were anxious to discuss the claimant's absence from work due to ill health and the likelihood of her return to work in the near future. The claimant agreed to attend an occupational health physician if the respondents agreed to mediation.

The occupational medical consultant was furnished with a report from respondent ST in advance of the consultation with the claimant on 1 July 2009. The claimant furnished him with a letter from her caring doctor and specialist on that day. The consultant concluded that the claimant's medical condition was interfering with her work capacity and that it was unlikely that she would ever be able to return to her present employment without experiencing undue stress and finally suggested that both parties enter into a mediation process as a matter of urgency. They all took part in mediation but regretfully, mediation was unsuccessful.

Medical certificates continued to be furnished by the claimant. In the absence of the claimant who refused to attend a further medical capability meeting, the meeting proceeded on 26<sup>th</sup> August 2009. The claimant's medical capability was discussed. Medical certificates were reviewed and also the consultant's report. They looked at reasonable accommodations since the claimant commenced employment. The consultant did not believe that the claimant would ever be able to return to her present employment without experiencing undue stress and it appeared that any

treatment the claimant was receiving for her stress was not working. The claimant's medical certs from 30<sup>th</sup> March to 25<sup>th</sup> May 2009 cited her illness as stress and medical certs from 25<sup>th</sup> May 2009 onwards cited her illness as work related stress.

The respondents did as much as they could to help the claimant during her tenure. They hired extra help. They took work home with them and had already had taken a lot of work off her.

By letter dated 3<sup>rd</sup> September 2009 the claimant was formally dismissed from her employment. She was offered a right of appeal and chose not to appeal the decision to dismiss her.

### **Claimant's Case:**

The claimant had suffered ill health for many years. She suffered badly with facial pain. She qualified as a barrister and practised in that profession for many years. Because of her ill health she left the profession and then had to look after her ill mother. She was prescribed medication, which improved her health problems. She participated in a community employment scheme, did part time for a residents association, and worked for a public broadcasting company for a period of two weeks in January 2007. In February 2007 she was interviewed for the position of secretary for the respondents business. She attended a second interview in March 2007 and commenced employment with the respondents on 11 April 2007.

Her medication made her drowsy and for a period her performance at work and her timekeeping were not good. It took her a while to settle in on the job. It was a friendly place to work.

She was made permanent in her position in July 2007. She received a Christmas bonus of €500 euro in post office vouchers.

In May 2008 she suggested a re-organising of the filing system. That month one of ST's files was missing and she was terribly upset. She tried to help out and ST yelled at her.

The claimant had root canal dental treatment to attend to and asked ST's permission to make appointments. She had five appointments in total. She booked them between 7.30 am and 8.00 am. On occasion her appointments ran a bit late and ST insisted she cancel her last appointment.

Towards the end of August 2008 the respondents agreed to give her a pay rise of €2000.00. They told her they were pleased with her work. She had a meeting on 2 September 2008 with ST about her timekeeping of late. The claimant promised she would be on time from then on. She often received texts from ST asking her if she was coming in today. The claimant contended that she did not let people down.

The next day, 3 September 2008 the claimant was seven minutes late for work. ST was annoyed and sent RL down to speak to her. The claimant raised her voice but immediately apologised. She went on her own holidays and was very upset. ST also departed on holidays that day for a longer period than the claimant.

In ST's absence from the office she opened her post as she always did. The payslips had arrived and she took photocopies of them and left them back on the desk. When she received her cheque that Friday she noticed the cheque was for a lesser amount than what was cited on the payslip. She spoke to RL about the discrepancy. The claimant referred to the Payment of Wages Act and RL told her not to be threatening the law at him. He then paid her the difference in the amount.

On 22<sup>nd</sup> September 2008 ST returned from holidays. Both ST and RL came down and told her they were having a meeting. The meeting was acrimonious, her lateness was discussed together with her behaviour, ST said, “we dictate and you do”, her job security was called into question and was told she could be sacked. All in all the claimant attended four meetings about her lateness and behaviour.

RL had hired a temporary secretary from her early days in employment. There was a suggestion that she could not deal with the volume of work. Work had been less busy in her early days but the workload increased over time. Reports were the most important part of her job. She could type up as many as six a day.

At a meeting the claimant attended on 21<sup>st</sup> October 2008 ST said, “this is not sheltered employment”. Her dental appointments were again discussed. This was the fourth meeting about the same issues. She asked the respondents to be kind and let her go to her dental appointments. She often came up with suggestions and would be criticised. The meetings had no agendas and no minutes were taken.

Her 2008 Christmas bonus was halved and she was not particularly happy. In January 2009 she experienced health difficulties and was absent from work on sick leave. She had a family bereavement in February 2009 and had to take care of funeral and family affairs.

She returned to work on 9 March 2009 and the respondents asked her for a certificate of fitness to return to work. ST removed her post duties from her. She felt she was coping fine. In the first week there was little work. ST and RL had not acknowledged her bereavement.

On 27 March 2009 ST queried a referral that had not been dealt with from the previous Tuesday and was most annoyed with her.

The claimant was quite often waiting a long time for her pay cheque. She asked ST would she mind paying her by one o'clock on a Friday. There was a discussion over a particular file that had not been dealt with. Upon her return from lunch RL came down and asked why she was upset ST earlier. Later that afternoon the respondents told her they were concerned about her health and would like her to see a doctor. She was absent on sick leave from 30<sup>th</sup> March 2009 onwards.

On 30<sup>th</sup> March 2009 she wrote to the respondents about certain issues not being addressed. She felt belittled and was castigated for errors. The claimant wanted the respondents to relate to her individually. It was always two of them confronting her.

The following week she received a new contract of employment together with an employee handbook. There was no discussion on the new contract.

She received an e-mail from ST the next week enquiring when she might be back at work. RL had said she could not come back to work. Her doctor had said she suffered from work related stress. The claimant contended that if she had one meeting and the respondents listened it would help matters. She felt mediation would help.

On 5<sup>th</sup> May 2009 she wrote a detailed letter and reiterated her points. She suggested a redundancy package. She was open to other suggestions of course. ST said that she could not leave. The claimant said if they made things impossible for her and she had to leave it could be construed as a

constructive dismissal.

The claimant attended a medical capability meeting with her partner on 20<sup>th</sup> May 2009. This meeting was arranged in the absence of a medical report. They asked her to attend for a medical and then they would discuss other issues. The respondents agreed to mediation following the claimant's attendance at a medical.

The claimant attended a consultation with an Occupational Medical Consultant on 1 July 2009 and a mediation meeting on 8 July 2009. She was very disappointed the way the meeting went.

A further medical capability meeting was scheduled for 26<sup>th</sup> August 2009 but she chose not to attend that meeting. She contended that the information ST supplied to the medical consultant was incorrect and she subsequently wrote to the consultant on the matter.

The claimant contended that she could not return to work. She was sabotaged at work. It was very hard to work in the circumstances. She was formally dismissed from her employment on 3<sup>rd</sup> September 2009 and was offered a right of appeal to RL. She saw no point in appealing the decision as RL had always agreed with what ST said and it was in his interest to agree.

Since the termination of her employment her self-confidence has been low. She applied for several administrative jobs. A friend of hers had set up an agency and she did some work for her on a voluntary basis. She is in receipt of social welfare benefit of €188 per week.

### **Determination:**

The Tribunal carefully considered the evidence adduced during the course of this two and half day hearing.

In the circumstances, the respondent employers acted reasonably in relation to the claimant. They acted reasonably on foot of the complaint of bullying in that they attempted to resolve this informally, and did so temporarily, when the allegation first emerged in 2008. By the letter from RL of 2 April 2009, the respondents attempted to arrange an investigation into the allegation which the claimant refused to attend on health grounds.

When the respondents subsequently had the claimant medically examined by Dr. H his conclusion, that it was unlikely that the claimant would ever be able to return to her employment with the respondents without experiencing undue stress, justified the respondents in terminating her employment. The respondents had previously asked the claimant to nominate an independent occupational health specialist to examine her. The parties subsequently attempted mediation, as recommended by Dr. H, but this was unsuccessful.

The respondents had only one employee, the claimant, who provided support and secretarial work for both of them in their office. It was the view of the independent occupational health professional that the claimant could not continue to work in that environment as the sole employee.

In all the circumstances, the respondents reasonably believed that the claimant would be permanently incapable of performing work of the kind, which she was employed to do.

The Tribunal finds that the claimant was not unfairly dismissed. Her claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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