

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

-Claimant

CASE NO.

UD2195/2009

against
EMPLOYER

-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Hennessy
Mr F. Dorgan

heard this claim at Carlow on 5th May 2011 and 13th July 2011

Representation:

Claimant: Mr. James Kavanagh B.L. instructed by Ms Julie Breen, Garahy Breen & Company,
Solicitors, 4 Castle Street, Enniscorthy, Co Wexford

Respondent: Ms. Pauline O'Hare, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant gave evidence that her employment commenced in 1997. At that time she worked 39 hours per week as a catering assistant. A transfer of undertakings occurred in 1998 at which time the claimant was promoted to supervisor. A further transfer of undertakings occurred in 2001 to the respondent company. From that time the claimant reported to a succession of managers. The claimant held a full-time supervisor role but due to personal circumstances she had to reduce her hours. It was the claimant's evidence that at the company's request she worked her reduced hours over five nights but that the company agreed to sign the claimant's social welfare forms to the effect that the claimant was only working three nights, thereby allowing her to claim social welfare for the other two days. It was the company's evidence that no such arrangement existed and that the forms had been signed in error.

The employment relationship was uneventful until the time of April 2009 when the Frontline Manager was approached by another employee who stated that she wanted the same social welfare arrangement as the claimant. This was the first time that the Frontline Manager realised that she had been signing social welfare forms incorrectly for the claimant. She stopped signing them

immediately.

She addressed the matter with the claimant on 12th May 2009 and told the claimant that she could not continue to sign the social welfare forms in error, allowing the claimant to claim social welfare payments for two days when she was actually working. At the meeting the claimant requested to work her 24 hours per week over three nights allowing her to legitimately claim social welfare for the other two days. The Frontline Manager considered the request but informed the claimant that due to business needs her request could not be facilitated. The claimant then made a statement to the effect that if the company “..wanted to play a game like that”, then she would go to the social welfare office and inform them that the company had been signing fraudulent social welfare forms and that she would “..open a can of worms.”

The Frontline Manager gave evidence that the company has a grievance procedure and the claimant could have availed of this procedure but instead she had threatened the company. The Frontline Manager felt threatened by what the claimant had said and she believed that trust had broken down between the parties when the claimant made the threat. She reported the threat immediately to human resources.

In relation to signing the fraudulent forms the Frontline Manager stated that her predecessor had told her that the claimant would complete the forms for her to sign. As a result she had trusted the claimant to complete the forms correctly. During cross-examination the Frontline Manager acknowledged that she had signed the forms incorrectly for 26 weeks but stated that to be an oversight on her part. She refuted that it was an agreement that the company had with the claimant.

In reply to questions from the Tribunal, the Frontline Manager confirmed that there were thirteen employees at the site and she aware that the claimant worked five nights per week. She accepted that this contradicted the forms she had signed.

The Human Resources Manager confirmed that the Frontline Manager had reported the incident of 12th May 2009 to her. When the Human Resources Manger met with the claimant on 15th May 2009 in relation to this matter, the Frontline Manager was present as a note-taker.

At the meeting the Human Resources Manager asked the claimant to outline her issues and the claimant made the request to work 24 hours per week over three days. However, the Human Resources Manager understood the business needed the claimant to continue carrying out her role over five nights as she had been doing for a number of years. The claimant raised the issue that for years the company had been signing the social welfare forms stating that she had been working her hours over three days and that she would inform the union and report the matter to the social welfare office. The Human Resources Manager told the claimant that she felt this was a threat and the claimant subsequently apologised. The claimant then started to say that if the company “..want to play dirty with me....” The Human Resources Manager believed this to be a continuation of the threat.

She informed the claimant that such allegations could be considered gross misconduct. A letter dated 19th May 2009 informed the claimant that she was suspended pending an investigation into allegations that she had made threats against the company and a further allegation that she had threatened to blackmail the company. The claimant was warned in the letter that should the allegations be found to have grounds then it could lead to her dismissal.

A formal investigation meeting was held on 21st May 2009. The Frontline Manager was present at

the meeting as a note taker. At the meeting the claimant confirmed the Frontline Manager's statement to be a true account of the meeting on 15th May 2009. The claimant apologised to the Human Resources Manager for the comments she had made on the previous occasion.

It was the claimant's evidence that she could not understand the manner in which she was now being treated given her length of service. At the meeting she raised the issue that the company had asked her to work 24 hours over five days and that in turn the social welfare form would be signed to the effect that she had only worked three days. She consented to this agreement to facilitate the company.

It was the Human Resources Manager's evidence that she had tried to find out if such an agreement was in place. She spoke to the Regional Manager but he had no recollection of any such agreement. The Human Resources Manager felt there was evidence that the claimant had used threatening behaviour which was gross misconduct and for this reason she instigated the disciplinary process.

In reply to questions from the Tribunal, the Human Resource Manger stated that she did not think that an external independent investigator was necessary, as the Frontline Manager had never denied signing the social welfare forms.

A formal meeting as part of the disciplinary process was held on 27th May 2009. A Senior Human Resources Manager conducted this meeting and the Frontline Manager was present as note-taker. The Senior Human Resources Manager had already reported the matter to the social welfare fraud office by letter dated 21st May 2009.

When she met with the claimant on 27th May 2009 she gave the claimant an opportunity to mount a defence. However, the Senior Human Resources Manager did not believe that the threats had been made "in the heat of the moment" as they were made on two different occasions and to two different managers. She perceived it as a threat by the claimant in an attempt to make the company change her terms and conditions. There was no evidence of an agreement in place with previous managers. The Senior Human Resources Manager did take into consideration that the claimant had apologised on a number of occasions. However, the trust between the parties was damaged.

The Senior Human Resources Manager reached a decision to dismiss the claimant for gross misconduct. She did not consider a lesser sanction to be appropriate in the circumstances. A letter of dismissal dated 28th May 2009 was issued to the claimant. The letter set out that the claimant was dismissed on grounds of gross misconduct for threats she had made and that she submitted fraudulent documentation to social welfare. However, the Human Resources Manager confirmed that the claimant was dismissed due to the threats she had made to the company, which had resulted in a breakdown of trust.

It was the claimant's evidence that during the disciplinary process she was offered a full-time position as a catering assistant but the offer was subsequently withdrawn. It was the company's case that no such alternative position existed to offer to the claimant.

The Client Account Manager gave evidence that the six regional managers report to him. He heard the claimant's appeal of the decision to dismiss her on 24th June 2009. The Frontline Manager was present as note-taker. No new evidence was put forward at the meeting. The claimant's request to

change her terms and conditions was not feasible for the company to facilitate. He did not consider what the claimant said to have been “in the heat of the moment” as she had said it on two different occasions. He upheld the decision to dismiss the claimant on grounds of gross misconduct. The claimant was informed of his decision by letter dated 2nd July 2009.

It was the claimant’s evidence that a succession of frontline managers signed the social welfare forms to the effect that she was only working three days per week. With the changeover from one manager to the next the claimant had always outlined the situation to each of them including the current Frontline Manager. A booklet was opened to the Tribunal containing copies of the social welfare documents submitted during the claimant’s employment. The documents showed that for some 45 weeks the claimant had herself signed her name for the employer’s signature on the social welfare forms (it was her evidence that she was instructed to do this by her managers). Various managers in the respondent company signed the forms for the other 147 weeks.

The claimant met with a social welfare inspector in relation to the claims that were made and she is re-paying the sum owed at a rate of €10.00 per week. The claimant gave evidence regarding her efforts to mitigate her loss and of the circumstances which hinder her from seeking work outside her local area.

Determination: _

The employer clarified to the Tribunal that the sole reason for dismissal was the perceived threat against the company to report it to the Department of Social and Family Affairs and not the submission of fraudulent claims to the social welfare by the claimant.

While it is not the role of the Tribunal to investigate the nature of the social welfare fraud that occurred in this matter, nevertheless in order to arrive at an informed decision, the Tribunal must have regard to the context of the encounter between the claimant and the Frontline Manager on the 12th May 2009.

On balance the Tribunal prefers the claimant’s version of events to the effect that, when discussions were held at the time when she was asked to work 24 hours over five nights rather than over 3 days, she and her employer were parties to the arrangement whereby docketts would continue to be submitted to the social welfare to indicate that she was still, in fact, working 3 days per week. The Tribunal is of the view that it was an implied term of the claimant working five nights per week that she would not be financially disadvantaged by doing so. The Tribunal was impressed by the evidence before it that a succession of managers, to include, the current Frontline Manager signed the weekly docketts for the social welfare, which clearly recorded the claimant as working three specified days. Indeed the Frontline Manager, the manager in place at the time of the dismissal, confirmed that, during a period of in or about 28 weeks when she signed off on these docketts, she was aware that the claimant was working five nights per week.

The company quite correctly put a stop to the signing of these docketts in May 2009 against the backdrop of another employee looking for a similar arrangement yet took no steps to honour the terms under which the claimant went on the night shift i.e. that she would not be financially disadvantaged as a result.

While the exchange of the 12th May and the earlier portion of the meeting of the 15th May may well

have raised some issues of mutual trust, the Tribunal is of the opinion that a reasonable employer would not, given the context, have concluded that the trust between the parties as fundamentally undermined and that the relationship between the parties had been irreparably damaged.

The employer's response was disproportionate in all of the circumstances and, accordingly, the dismissal of the claimant was unfair. The Tribunal is satisfied that, given her limitations, that the claimant did take reasonable steps to mitigate her losses. The Tribunal awards the Claimant the sum of €20,000 under the Unfair Dismissals Acts, 1977 to 2007.

A copy of this Order will be sent to the Department of Social Welfare and Revenue Commissioners in accordance with the statutory obligation of the Tribunal under Section 7 of the Unfair Dismissals (Amendment) Act 1993

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)