

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE  
- *claimant*

**CASE NO.**  
UD182/2010

against

EMPLOYER  
- *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Mr D. Hegarty  
Mr O. Wills

heard this claim at Cork on 29th June 2011

#### Representation:

Claimant: Mr David Pearson, G J Moloney, Solicitors, City Quarter, Lapp's Quay, Cork

Respondent: Mr Eoin Clifford BL instructed by Ms. Jennifer O'Sullivan, Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

The determination of the Tribunal was as follows:-

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.

#### **Claimants Case**

The claimant is a part qualified ACCA accountant. She commenced employment with the respondent as an agency worker in November 2007. The then CEO (hereinafter referred to as A) of the respondent in 2008 approached her and asked her to name her terms to come to work directly for them. The claimant requested a salary of €50,000.00 per annum, A reverted back to her and explained that they could not approve €50,000.00 however they would pay her an annual salary of €45,000.00 plus 2 bonuses of €2,500.00 throughout the year. She signed a fixed term contract of six months to this effect on the 1<sup>st</sup> May 2008. The respondent company is part of a larger group that at the time was going through restructuring. She accepted this contract on the basis that this review was being carried out.

In her position she was book keeping for the respondent and another subsidiary of theirs. She received her first bonus payment in December 2008 or January 2009 of €6000.00 but by this time she had accrued a bonus of €8000.00. She asked A what had happened to her bonus payment for November and December 2008 and A gave her an undertaking she would receive this payment with her bonus payment in June or July 2009. She accepted this, as it was not worth payroll running a special payroll to pay her when they could tack it on to her June payment.

At the end of her six-month contract the restructuring was not complete and she raised the issue of her contract being expired with A. However at this time they were involved in preparing for a large court case and this was the respondent's priority. She raised the issue of her contract again with A after Christmas 2008 when A was promoted to the group financial controller. She first raised the issue of her bonus with A in May as she was doing the projected cash flow for June; A informed her that no decisions had been made on bonuses being paid. She informed A that her bonus was contractual and A agreed with her. She continued to raise her bonus with A and A informed her that the AD (managing director) had made the decision not to pay any bonuses. A told her that she would discuss her bonus with AD.

The claimant included her bonus in the approved expenditure for June and July and advised of A of this, but she was not paid. She was constantly raising this issue with A in June and July and A would try to see AD to resolve it but would never get to see AD. A reported this back to her firstly weekly and then it became daily in respect of her bonus. A assured her that she had told AD that they needed to get the situation resolved. She informed A that she would have to terminate the contract that she was on, to get rid of the bonus and get it put in to a new contract as flat salary as she did not want to have to constantly chase her bonus. A advised her that AD would see this as an ultimatum and would deal with it in that way. A continued to try and resolve her bonus with AD.

In September 2009 she submitted a letter to the respondent stating "with regret I am terminating my contract with *respondent*. We have been trying to resolve the issues surrounding my pay vs. contract terms since the beginning of July and it would appear there is still no resolution. This termination does not prevent negotiations for a new contract, but it does not seem as though the organisation is willing to pay the agreed rate." This letter goes on to say she had been under paid from November 2008 and the claimant outlines her holidays booked and owed, and that her last working day will be Thursday 10<sup>th</sup> September 2009. She gave no prior warning to A before she gave her this letter. She received no written response to this letter. She reiterated that A was trying to resolve the issues for her but it was not given any priority. A told her that AD thought it was better that she should go. She continued to work until the 10<sup>th</sup> September and during this period she showed the work in progress to A to hand it over to her.

On her return from holidays she returned to the office say a proper goodbye to A and another colleague. She was never issued with an employee handbook nor given and policies or procedures including the grievance. The first time she saw the respondent's grievance procedure was at this hearing. She was never advised to use the grievance procedure, as far as she was aware if she had any disputes or issues she had to talk to A.

Originally she was running accounts for two companies and then ultimately became responsible for five companies when A was promoted to group financial controller. Her work on the court case lasted up until a settlement in December 2008. She had raised her workload with A, as she was constantly prioritising her work while being while being requested to do other tasks. This resulted in a colleague complaining about her to A. In response to this she wrote an email to A setting out her concerns, in respect of her workload after this her work profile changed. A took some of her

assigned tasks off her and reassigned her other work. Even though her work profile had been changed she was still doing the same amount of work.

Under cross examination she explained that she never complained about the additional work she had to do in respect of the court case as she was aware it was exceptional circumstances. She denied that when the case settled in December 2008 that she had said to A that she supposed she would be taking on extra work. She had said to A that it would be nice to get back in to the proper job. She had asked A about her contract at this stage and had constantly advised her of expired contract and additional work before she sent the email of the 18<sup>th</sup> March 2009. She had not mentioned her contract on this email, as this was a direct response in respect of complaints about her. It was not surprising it was the only email she had sent to A about issues as A sat next to her and she normally spoke with A. A took offence to the email she sent as A thought they had a good working relationship. After this email A was aware that she was unhappy and overworked.

She had firstly raised the issue of her bonus as part of her work for forthcoming expenditure. It was when she was informed it would not be paid that she disputed the fact that it was part of her salary. She denied that it was August when she first raised the payment of her bonus. As soon as she informed A that her bonus was part of her salary A had said she would discuss it with AD, this was a constant issue she had raised with A. She did recall telling A that as her contract had expired in November 2008 that she did not have a leg to stand on. She was aware that no bonuses were being paid in two companies as she was dealing with the cash flow of same. However she was not aware that there was a pay freeze on.

It was put to her that she resigned before A had got a chance to discuss her bonus with AD. She disagreed with this, for a month A had been trying to discuss this with AD, but AD was making it difficult for A to see him. She had never dealt with AD directly all communication from him came through A hence she did not write to AD directly about her bonus. As her contract had expired she did not have permanent status, she felt she had exhausted all avenues through A and the only way she could get AD to listen was to terminate her contract and renegotiate a new one. She was unaware of redundancies at that time taking place in the respondents group.

She denied that when A had told her that her resignation was accepted that she had replied “in fairness you did say if I did it he would accept it”, in fact A came out from AD’s looking white as a sheet. She could not comment if other employees’ bonuses were performance related, as she had not seen their contracts. She re-iterated that she had not said in her letter she was resigning, she had said she was terminating her contract to renegotiate another. Her contract was supposed to have been sorted out eight months prior but everything else took priority.

She gave evidence of loss.

In reply to questions from the Tribunal if she had been paid her bonus she probably would not have resigned. There was no formal consultation or formal reply in relation to her bonus. She had never been told that the bonus would never be paid.

### **Respondents Case**

A gave direct sworn evidence on behalf of the respondent. She is the group financial controller since January 2009. The claimant always worked with her. The claimant had received six months bonus in December 2008 not the eight months due to her. She informed the claimant that it would be resolved in the June payment. 2008 and 2009 they were extremely busy and working long

hours, and once the court case was over she ensured the claimant things would return to normal. With the recession advertising was hit badly and their turnover decreased from 106 million to 83 million, so all were aware there would have to be cut backs.

The email of the 19<sup>th</sup> March 2009 had arisen because an employee was going on a day course and the claimant would not issue him with a cheque to pay for same, as an invoice had not been signed off. She had informed the claimant that they would have to discuss issues the claimant had sent her the email in response. When she received the email she had tried to ring the claimant but her call went to voicemail. She had never told the claimant that others were complaining about her.

She sat down with the claimant to discuss the email. The email had offended her. They discussed her workload and she agreed to re arrange this, and all was resolved after this meeting the claimant never raised any thing else with her in respect of this.

The bonuses were normally paid in July and it was not until payroll was discussed in July that they were aware they were not getting bonuses. The claimant did not raise her bonus with her in May; it was the end of July before she raised it. Nor was the claimant discussing her bonus with her on a daily or weekly basis. In July the claimant had mentioned to her that she had all her finances planned and if her bonus was not being paid she may not be able to stay with the company. She had warned the claimant at this stage that if she handed in her resignation it would be accepted.

She had told the claimant that she would talk to AD, but then she was on holidays followed by AD on holidays. She had attempted to talk to AD after this but he would put her on the long finger and by the time she got to speak with AD the claimant had submitted her resignation. She thought that the claimant's letter was a drastic step and that she was gambling with her career. The claimant had never told her she was submitting this letter. She had informed the claimant that AD had accepted her resignation; they had recently lost another member of staff so the claimant's resignation was the last thing she wanted. Nobody in the respondents in 2009 got a bonus irrespective whether it was contractual or not.

She had always had a very good open relationship with the claimant and on her last day had gone to lunch with her. As their relationship was so open it would explain why there were no emails between them. She reiterated that it was not true that they had daily contact regarding the bonus, as they were too busy. The claimant had been shocked when her resignation was accepted.

Under cross-examination she had acknowledged that the balance of the bonus due to the claimant in December 2008 was not paid in July 2009. She did not speak with the claimant when she submitted the letter of resignation and had given the letter to the HR manager. Even though the claimant was her right hand person she felt that the claimant had made her mind up. In March the claimant had been reconsidering her position and in July had mentioned she might resign. She was referred to the claimant's email of 19<sup>th</sup> March 2009 and her handwritten notes on this and it was suggested that at the end of the meeting which resulted from this email her primary purpose was to address her sense of grievance and not the claimant's. She explained that she hadn't taken grave offence to this email however she did take exception to the claimant stating that she was being abused. At this meeting they had discussed all the issues and agreed what bodies of work could be removed, she had gone out of her way to accommodate the claimant.

In July 2009 she had not explained to the claimant that her bonus balance outstanding from December 2008 would not be paid, they had discussed bonuses in general which were raised for financial reasons. She had not given the claimant a grievance procedure and had not thought of this

at the time of the claimant's resignation as the claimant had made her mind up. She accepted that the claimant had raised with her that her contract was out of date. The claimant's contract just rolled on but the claimant was not advised of this. She had asked the claimant at one stage if she wanted to join the pension scheme and the claimant also acquired sick benefit.

In reply to questions from the Tribunal she did not know if the pension was voluntary however she had given the claimant the option of joining the scheme. The company's mind was made up that no bonuses would be paid in 2009 this was not communicated to employees in writing. The claimant's bonus was structured so she would get €50,000 annually. She had agreed with the claimant that the bonus payment due from December 2008 would be rolled in to the July 2009 bonus payment.

The respondent's group HR manager gave evidence. He explained that there were many other employees who historically were paid a bonus who will not receive a bonus in the future. A had shown him the claimants letter of resignation and as the claimant was an independent woman they had accepted it at face value. The claimant had indicated previously that she was going to resign.

### **Determination**

The Tribunal having considered all of the evidence adduced at this hearing find that the claimant was constructively dismissed having regard to all the circumstances.

We accept that the claimant's salary was €50,000.00 per annum and we find that the employer unilaterally changed her salary by not paying her unconditional bonus. The employee is entitled to claim constructive dismissal and in coming to this decision the Tribunal considered the case of *Stokes -v- Hampstead Wine Company Ltd (1979) IRLR298*. Therefore we award the claimant €35,000.00 under the unfair dismissals act 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

(CHAIRMAN)