

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE – claimant

UD168/2010

Against

EMPLOYER - respondent

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. M. Carr
Mr. F. Barry

heard this claim at Navan on 10th March 2011

Representation:

Claimant: Ms Christina Geraghty B.L. instructed by:
Mr. Philip Treacy
Philip Treacy, Solicitor
16 Abbeyfield, Kilcock, Co. Kildare

Respondent: Mr. Gearoid O Bradaigh B.L. instructed by:
Mr. David Murphy
Patrick Noonan & Co, Solicitors
Upper Bridge Street, Athboy, County Meath

The determination of the Tribunal was as follows:-

As this was a case of constructive dismissal the claimant gave her evidence first.

Claimant's Case:

The claimant began her employment as a support tutor for an adult literacy programme in County Meath in February 2000. As part of her role she worked at a local halting site. Her role was to support and assist parents and their children with their homework and taught 'back to basics' classes for people with low

literacy skills. She signed a new contract in September of every year which lasted until the following June. In June of each year, the claimant requested a letter for the Department of Social Protection from the respondent, so that she could claim assistance for the break in her contract. She said that the letter indicated to the Department, that she would be returning to work in the September of each year.

The employment was uneventful until September 2008, when the claimant went to the adult literacy centre to collect the roll book for the halting site, and was informed by the local programme manager (PM) that she was to no longer go to the halting site, as it did not come under adult literacy funding anymore. The claimant was told that it would come under a family learning fund, so she went to Galway and did a course to teach same at her own expense. While working at the halting site eight hours per week, the claimant also worked extra hours teaching groups, and was paid for the additional time worked. The claimant contacted the National Employment Rights Authority and was told that under the Part Time Employment Act 2003, she was entitled to a permanent contract if she had more than four years and six months service.

She contacted the respondent and asked to speak to the CEO but was told that there were many rungs in the ladder to get to speak to him. In September 2008, she was told that she would be teaching the family learning course at the adult literacy centre on a pilot basis. She explained that every time she began a new course, she signed a ten-week contract. In May 2009, she wrote to the PM and requested a meeting with the HR manager. In June 2009, she met with the HR manager and an adult education officer (AEO) to discuss her contract. When she received a copy of the minutes of the meeting, they did not match her recollection of how the meeting went.

When she went back to teach in September 2009, she was offered a 'back to basics' class to teach for two and a half hours per week. A local co-ordinator for a different centre offered her hours teaching a class for people with special needs. The claimant told the LCO that she did not have the required training but was told if she did not want the job others were interested.

When the claimant began to teach the class, a staff member told her that two of the students had epilepsy and that one of them had had an epileptic fit in the classroom on the previous Monday. When she became aware of this she felt very unsafe in the classroom. She telephoned the local co-ordinator and told her that she would need a classroom assistant because of the risk of one of the students having an epileptic fit in the classroom. On the 9th October 2009, she then received a very insulting email from the local co-ordinator. She could not believe that the email would be put on her personnel file. After the email she was too upset to continue working for the respondent.

Respondent's Case:

The Adult Literacy Organiser for the county gave evidence that programmes for the county are developed based on need. There are six centres in the county and a number of outreach programmes. When she took over in November 2007 she

introduced herself to all the tutors during meetings at the various centres. She gave a presentation of the changes she envisaged.

When she found out about the homework club she was concerned as the programme was for adult literacy and that was what the funding was for. She informed the co-ordinator that the homework club would cease at the end of term in June 2008. She did not understand why the claimant believed it was a 'bolt out of the blue' in the autumn of 2008 as the claimant had told her at an open day in June 2008 that she would be sad leaving the kids. The claimant was offered to tutor a new adult literacy course in September 2008.

The claimant submitted her letter of resignation on October 16th 2009. The next day she met the claimant and asked her if she wanted to discuss her decision, but the claimant put her hand up and would not speak to her. This witness told the claimant that she could come back to her if she wanted to. The only issue the witness was aware of prior to this was when a local co-ordinator informed her that the claimant was discontinuing tutoring a class due to an incident another tutor had in his class.

During cross-examination the witness stated that she was unaware of any lengthy correspondence the claimant had with the respondent company. She was aware that the claimant was concerned over a student in one of her classes who suffered from epilepsy. The student had had a seizure while in another tutor's class. The claimant went to the HR unit over these issues. She was aware that the claimant was concerned about her hours after the homework club ceased. She told the claimant that there were other hours coming up. The letter of October 19th 2009 was the only letter from the witness to the claimant.

The students in the special needs class were studying for a regular qualification and the claimant did not require any extra training. The students were assessed and were considered able for the course. The claimant was aware of their needs and when the witness asked the claimant if she was ok with it she said she was. She gave the claimant a contract in September 2009 which the claimant would have taken away with her. She did not have a copy signed by the claimant. A family learning programme was established and the claimant was asked to provide tutoring. She discovered afterwards that the claimant was going to China for three weeks and she extended the claimant's contract to accommodate her.

She approached the claimant after receiving her letter of resignation but the claimant would not speak to her and put her hand up. She told the claimant that she would be in the next room if she wanted to talk. She did not know why the claimant would not speak to her. She went back to the centre the following day to speak to the claimant but was unable to do so.

Determination:

The claimant began her employment as a support tutor for an adult literacy programme in County Meath in February 2000. As part of her role she worked at

a local halting site where she assisted children with their homework. She also taught 'back to basics' classes for people with low literacy skills. She signed a new contract in September of every year which lasted until the following June.

The employment was uneventful until September 2008, when the claimant went to the adult literacy centre to collect the roll book for the halting site, and was informed by the local programme manager (PM) that she was to no longer go to the halting site, as it did not come under adult literacy funding anymore. Instead she was told that she would be teaching the family learning course at the adult literacy centre on a pilot basis.

When she went back to teach in September 2009, she was offered a 'back to basics' class to teach for two and a half hours per week. A local co-ordinator for a different centre offered her hours teaching a class for people with special needs.

When the claimant began to teach the class, a staff member told her that two of the students had epilepsy and that one of them had had an epileptic fit in the classroom on the previous Monday. When she became aware of this she felt very unsafe in the classroom. She telephoned the local co-ordinator and told her that she would need a classroom assistant because of the risk of one of the students having an epileptic fit in the classroom. On the 9th October 2009, she then received, what she considered, a very insulting email from the local co-ordinator. She could not believe that the email would be put on her personnel file. After the email she was too upset to continue working for the respondent and she resigned her position on the 16th of October 2009. Her claim before the Tribunal is for what is commonly known as constructive Dismissal.

The Tribunal has to decide whether the Claimant was constructively dismissed. It is clear that the Claimant resigned from her employment subsequent to the email of the 9th October 2009. The Claimant is claiming that she was dismissed by construction as defined in the Unfair Dismissals Act 1977 which states that

“dismissal in relation to an employee means the termination by the employer of his contract of employment with his employer whether prior notice of determination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employer, to terminate the contract of employment without giving prior notice of the termination to the employee”.

The Tribunal must consider where because of the Employer's conduct the Claimant was entitled to terminate her contract or it was reasonable for her to do so.

An employee is entitled to terminate the contract only when the employer is guilty of conduct which amounts to a significant breach going to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. In the case of *Brady v Newman* UD 330/1979 the Tribunal stated

“..... an employer is entitled to expect his employee to behave in a manner which will preserve his employer's reasonable trust and confidence in him so also must

the employer behave”.

The Tribunal has to decide whether the employer’s conduct amounts to undermining the relation of trust and confidence between the parties in such a way as to go to the root of the contract. The contract test was summarised by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharpe* (1978) ICR 121 “.... *If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance*”.

The reasonableness test asks whether an employer conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to tolerate it any longer and justifies the employee leaving. The proximate cause of the Claimant’s resignation was the email of the 9th of October 2009.

The Tribunal does not accept that this email amounted to unreasonable behaviour on behalf of the respondent. The email was innocuous, mundane and not even mildly offensive

Except in very limited situations an employee must exhaust all avenues for dealing with his/her grievances before resigning. In particular (save in very exceptional circumstances) an employee

- > must bring his/her concerns to their employer’s attention;
- > invoke and exhaust internal grievance procedures {where there are no internal grievance procedures an employee must act reasonably};
- > the employee must give the employer an opportunity to deal with the employees’ complaints/concerns.

The conduct of the employer must not be petty or minor but must go to the root of the relationship between employer and employee.

The Tribunal acknowledges that the claimant is a conscientious and dedicated person. However the facts of this case do not amount to such a breach of contract to the extent that the employee was left with no reasonable alternative but to resign. Accordingly we consider that applying the case of reasonableness to the Claimant’s resignation that she was not constructively dismissed. If the Claimant has an honest belief that she views the work environment as producing intolerable conditions she is entitled to resign and such resignation may be viewed by the Tribunal as a ‘forced resignation’ constituting a ‘constructive dismissal.’ In *Wetherall (Bond St. W1) v. Lynn (E.A.T.)*¹, Bristow J. stated that:

“Entitlement to terminate a contract by reason of the conduct of the employer is a perfectly familiar concept of the law of contract. Like much else it is easy to formulate but can be difficult to apply...The law of contract for this purpose is that where an employer so conducts himself as to show that he does not intend to be bound by the contract of employment the employee is entitled, at his option, either to treat the contract as at an end, and cease performing his

part...The question of what is reasonable in the circumstances having regard to equity which has to be considered in cases of unfair dismissal, applies equally to the facts...It is the conduct of the employer which you must look at...But it is not the epithets which his conduct attracts, but whether you are entitled to treat your contract as at an end, and whether if you exercise your option to do so you have been 'constructively dismissed.'

Having carefully considered the evidence adduced the Tribunal could not find any substantial grounds that a dismissal took place in this case. Therefore the Claimant's claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)