

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**

**CASE NO.**

EMPLOYEE - *claimant*

UD260/2010

MN243/2010

against

EMPLOYER - *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Browne  
Ms. S. Kelly

heard this claim in Kilkenny on 23<sup>rd</sup> June 2011 and on the 5<sup>th</sup> September 2011

Representation:

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Claimant: Mr. Jerome O'Sullivan, J W O'Donovan, Solicitors, 53 South Mall, Cork

Respondent: Mr John G Harte, James Harte & Son, Solicitors, 39 Parliament Street, Kilkenny

The determination of the Tribunal was as follows:-

**Claimant's Case**

The claimant told the Tribunal that he finished college and qualified as an architect in 2003. While in college the claimant worked for the respondent during the summer time for 3 years and also during a year out. He then commenced full time employment with the respondent from the summer of 2003.

The claimant had a good relationship with the directors, (POD) and (CD), who were husband and

wife. As (CD) did not spend a huge amount of time in the office the claimant dealt primarily with (POD). Overtime the claimant became one of the more experienced and senior people within the practice. When (CD) returned the firm almost split, work was divided into (CD's) projects and (POD's) projects.

There were personal issues between the directors that began to overflow into the workplace leading to long verbal exchanges being overheard by staff. Things between the directors became hostile and the claimant could see that this was having a detrimental effect on other staff.

The claimant and the leading member of staff in the Naas office, (BL), were asked to prepare a letter by (POD) to write to the secretary. The claimant's relationship with (POD) was a good one and as the personal relationship between the two directors broke down (POD) was telling the claimant and (BL) about it. He told the claimant and (BL) that he was in the middle of a buy out from (CD) and trying to solve the problem for employees.

On the 26<sup>th</sup> September 2007 the claimant, along with (POD) and 2 other senior members of staff sent an email to (CD) in relation to her behaviour in the workplace. *"unless there is an immediate cessation to your highly damaging actions, we will be forced to take alternative means to protect the name and assets of the company."*

The claimant received a variety of emails from (CD). She was annoyed. The claimant and his fellow colleagues carried out all actions under the instruction of (POD). The claimant received an email on 20<sup>th</sup> November 2007 from (CD) asking for a retraction of the prior email and an apology in relation to its contents. The claimant made a verbal apology to (CD) in July 2008 apologising for the email being sent out into the public domain. The claimant did not apologise straight away as he was upset. The other members of staff involved were also called upon in relation to the contents of the email but they all agreed that none of them should apologise and they should stick together and allow (POD) to solve the issues.

On 26<sup>th</sup> November 2007 the claimant and his fellow colleagues, along with (POD), sent another email to (CD) addressing her disruptive behaviour and frequent loud verbal outbursts in the office and in particular her accusations to the claimant. The claimant told the Tribunal that (CD) threatened to complain about him to RIAI. The claimant asked (CD) for a copy of any report that was submitted to RIAI and that request was refused. At the time (POD) was Managing Director and he was getting emails back from (CD) or being copied in them by the claimant and his colleagues. (POD) told the claimant and his colleagues about the winding down of the company, that papers were being filed in the High Court for liquidation, and requested that they hold and wait.

There was no improvement of the personal issues between (POD) and (CD). In 2008 the claimant and his colleagues were being copied on emails re misappropriation of company funds, intimidation, harassment etc. The claimant was not surprised to be receiving such emails as at this stage there were no cordial discussions taking place between the directors. In April 2008 (CD) sent an email accusing (POD) of spying on her computer. This email was sent to the claimant and his colleagues but not to (POD). During this period of time the claimant was not personally engaging in any communication with (CD). He did not answer the phone when she called nor did he reply to her emails.

In March 2007 a new company was established with four Directors. The claimant was one of these Directors. This action was taken under instruction from (POD), who had informed the claimant

that the winding down of the respondent company was imminent. He had brought papers prepared by his solicitor to a meeting to show how the respondent company would be liquidated and how the new company would continue thereafter. This new company no longer became a vehicle to move forward but instead to transfer clients from the respondent to the new company. The claimant was concerned about what would be and this led to him emailing the secretary of the new company on 29<sup>th</sup> May 2009 and resigning his position as a Director of that company.

The claimant was at the receiving end of frequent verbal outburst from (CD). On one particular occasion, 23<sup>rd</sup> July 2008, during a phone call with (CD), the claimant was informed that unless he supplied written assurances in relation to RIAI documents that he would receive a written warning. (CD) told the claimant that this would be his third warning. The claimant maintains that he never got a written warning from the company or from (CD) personally.

The claimant and (LK), a fellow colleague arranged a meeting with a member of the RIAI to discuss the issues they were having within the practice. They informed this member that they were greatly concerned about threats made by (CD) of reporting them to the disciplinary committee for professional misconduct. The member of the RIAI informed them that all he could do was offer advice on structures but could not get involved.

During September, October and November 2009 a number of phone calls took place between the claimant and (CD). On 28<sup>th</sup> September 2009 (CD) informed the claimant that she wished to meet with him in respect of his position in the office which she believed to be untenable. She informed the claimant that she intended to bring a complaint to the equality reform board and that he would receive all correspondence within the coming days. The claimant made no comment. On 29<sup>th</sup> October 2009 (CD) contacted the claimant again and told him that he had the choice to resign or face action for gross misconduct.

On 9<sup>th</sup> November 2009 the claimant received an email from (CD) telling him that he can consider himself dismissed for gross misconduct and should he choose to ignore this dismissal it will also be included in a complaint to the RIAI. (POD) emailed (CD) on 9<sup>th</sup> November 2009 and informed her that she did not have the authority to dismiss the claimant and at this stage he has instructed the claimant to continue working outside of the office. The claimant found this extremely trying but continued to work on projects and sites outside of the office. (POD) told the claimant that the issues were nearly solved and he should keep his head down.

On 9<sup>th</sup> December 2009 the claimant received his P45 in the post. It did not have a cover letter attached. The claimant spoke with (POD) and outlined that he had received his P45. He explained that he could no longer put up with the current situation and that one month had passed since he was in the office and (POD) had told him at that stage that the matters were nearly resolved. The following day the claimant exchanged a number of text messages with (CD) in relation to passwords for computers and email.

The claimant received payment from the respondent up until 12<sup>th</sup> December 2009. He met with (POD) again on 15<sup>th</sup> December 2009 and informed him that he had a meeting with his solicitor the day before. He told (POD) that he could no longer be involved and could not entertain the idea of doing some work on a contract basis. At this stage (POD) told the claimant that he would give him his full support if he were to pursue bullying/constructive dismissal. This meeting took place in (POD's) house, where staff meetings were often had. The claimant then lodged his form with the EAT and considered himself dismissed.

(BL) joined the respondent in July 2002 and was based in the Naas office until Christmas 2008. He was in contact with the Kilkenny office on a weekly basis. The relationship between (POD) and (CD) broke down in 2006 and there was a bad atmosphere in the office. (POD) told (BL) and the claimant to write to the company secretary and in the letter state instances relating to (CD) but they agreed not to do so. He showed the letter to the staff and on the 12<sup>th</sup> March 2007 and sent the letter to (DB) the company secretary.

On the 26<sup>th</sup> September 2007, an email was sent to (CD). He did not know why it was written but it came from (POD). On the 3<sup>rd</sup> June 2008 he sent an email to (CD) regarding a project review meeting. He received a reply from (CD) stating she did not want (POD) to attend.

(CD) said she was leaving the business and the reason why he helped establish a new company was to ensure there would be a smooth carryover from one to the other.

(POD) was using them to get at (CD) and they foolishly went along with it on a number of occasions for the benefit of the company. The longer it went on the worst it got, (CD) seen us as being with (POD).

### **Respondents Case**

(CD) graduated from UCD in 1998. From 2006 onwards she started putting in more managing structures. She has two young children and their marriage broke down in 2005. She found out that they had set up a new company.

She had a road accident in early March 2007 and was puzzled when she was told about the letter sent to the company secretary. She was carrying out public sector procurement and regarded the claimant as her junior. She arrived two minutes late to a meeting that month and said it should not have started without her. (POD) said “that’s terrible” and whenever she made a comment she was told to shut up.

The following day, the claimant telephoned her at home and told her it couldn’t go on. She was quite surprised, this coming from a junior. She began looking for work outside the practice.

On the 26<sup>th</sup> September 2007 she received an email from the claimant about her trawling through his emails. She replied to him to say she had the right to do so. Later that day she received an email signed by (POD), (BL), (LK) and the claimant. There was a pattern to this. She was absent from the office and had not told the staff she was leaving. She had said that (POD) may buy her out.

On the 27<sup>th</sup> September she emailed the claimant and warned him about signing a form of collateral warranty. The claimant then changed his password and blocked her from accessing his computer. On the 4<sup>th</sup> October she emailed the claimant asking for the password.

She discovered some staff had gone to the RIAI conference in New York without telling her.

On the 26<sup>th</sup> November, she received another email from (POD), (BL), (LK) and the claimant. She was really shaken by this. The claimant had no right to seek any correspondences she had had with the RIAI. On the 21<sup>st</sup> April she received a letter of apology from (POD), (BL), (LK) and the claimant unreservedly withdrawing and apologising for the email of the 26<sup>th</sup> September 2007.

The Naas office closed in January 2008 and (BL) and (LK) were transferred to the Kilkenny office.

She was upset because other good staff were let go.

On the 22<sup>nd</sup> July 2008, she sent an email to staff regarding use of any RIAI documentation. The claimant ignored her. She sent another 3 - 4 emails and the claimant still would not give assurances about signing documentation.

In July 2008, the claimant was doing a nixer and was using the company printer. The drawings were quite expensive. The claimant was acting as a free agent and was preparing to leave. He was acting as an agent of another company and not hers. On the 18<sup>th</sup> she emailed the staff to say they were in breach of Health and Safety legislation. She sent an email to a personal friend and discovered a key stroke logger on her computer.

(BL) had put together a tender for a HSE contract. She held a disciplinary meeting with him over this. In January 2009, she told the claimant his conduct was very bad. In March she asked him for his resignation. In April she discovered the claimant was doing another nixer.

In September 2009 she went to a conference in the UK and when she returned home she went to her G.P and went sick for three weeks.

On the 13<sup>th</sup> November she met with the claimant and said resign or I will fire you. She reported him to the RIAI and dismissed him at the same time. He was dismissed for gross misconduct and paid for six weeks' notice. The only thing she was sorry for was not asking him to clean off his desk after the 26<sup>th</sup> September incident.

She resigned as a Director; it was a campaign of bullying and three employees trying to get control of the practice.

Under cross examination she said she was not aware of the communication (POD) had with the employees. She said the disciplinary rules and procedures do not apply as it was gross misconduct. The claimant chose to get involved to take her shareholding without paying for it.

(POD) gave evidence. The practice was split between Naas and Kilkenny. He had one team and (CD) had another. The claimant worked for them twice, in the summer and then full time. The claimant had a strong involvement with his projects and he took instruction from (POD).

He opened the other company for safety reasons. He took advice; it was a project based office and he did not want (CD) working on his projects. There was a family law issue and the advice was not to close or run down the affair. The company never traded. The staff came to him and complained. He told them to write to the secretary and they did.

The claimant was adequately aware of the situation. (CD) was told by his advisors to sit down, because the partnership was not going to last. The staff were worried and he brought the claimant with him to meet the advisors to show him what was happening.

In mid-2008, it was evident it would be a struggle to keep jobs going. The practice handbook prohibits work from outside. The claimant told him about a job in late 2009.

They had a difficult situation in the office. He gave (CD) all relevant information about the business. He wrote letters and signed them. If the letters are signed by four people, they are written by them. He did not see the interaction between the claimant and (CD).

He heard (CD) had dismissed the claimant. He met the claimant and told him it was nonsense, he worked for him, not (CD). He told the claimant he could work from home. He met the claimant a few days later and the claimant told him he had enough. He told him he was not fired and offered him a number of ways to stay employed including moving to a new company. The claimant set up his own company

### **Determination**

The Claimant was in the employment of respondent. The shareholders and Company Directors in the Company were (POD) and (CD), husband and wife, whose marriage appears to have irretrievably broken down in 2005. Inevitably perhaps, with both Directors working the company, issues pertaining to the marital breakdown and unresolved issues between both spilled over into the workplace.

The Tribunal is of the opinion that the claimant allowed himself to become drawn into the difficult dynamic that had developed between the Company Directors and in doing so contributed to the situation where his position within the company became vulnerable. In his own evidence to the Tribunal, the claimant accepted that he had been a participant in ostracising and isolating (CD) within the respondent offices. At best, his conduct in this regard was misguided.

The Tribunal is satisfied considering the totality of the evidence before it that the claimant was dismissed without any procedural fairness. For that reason the Tribunal holds that the claimant was unfairly dismissed.

In arriving at a measure of compensation the Tribunal has given due consideration to the extent to which the claimant contributed to his own dismissal. The Tribunal awards the claimant a sum of €12,500.00.

As the claimant received his notice the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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