

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1842/2009, MN2230/2009
WT763/2009

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr J. Killian
Mr D. McEvoy

heard this claim at Tralee on 14th April and 27th June 2011

Representation:

Claimant : Mr Paddy Whelehan, Philip O'Sullivan & Company, Solicitors,
14 Denny Street, Tralee, Co Kerry

Respondent : Ms Faye Revington B L instructed by
Broderick & Galvin, Solicitors, Ashe Street, Tralee, Co. Kerry

The determination of the Tribunal was as follows:

Preliminary Issue

The respondent contended that the claimant was excluded from the protection of the Unfair Dismissals Acts, as she did not have one year's continuous service with the respondent at the time of her dismissal.

It was common case that the claimant commenced employment with the respondent on 3 June 2008. On 22 May 2009 the respondent informed the claimant that her services were no longer required and that her employment was being terminated. The respondent maintained that he paid her a week's wages in arrears together with a week's notice and a gratuitous/ex-gratia payment equivalent to another three weeks' pay. The P45 issued to her gave the date of leaving in late May 2009. That P45 was not produced in evidence. Following discussions with the Revenue Commissioners and the then Department of Social and Family Affairs regarding payments to the claimant and her entitlement to claim job seeker's allowance the respondent issued a second P45 showing 26 June 2009 as the cessation date of the claimant's employment. A copy of that P45 was

produced into evidence.

In addition, copies of documents made and signed by the respondent clearly stated that the claimant was paid two weeks and four days in lieu of notice. The claimant was certain she received three weeks' pay in lieu of notice and there had been no reference to an ex-gratia or gratuitous payment. She only received one P45 and that gave her termination date as 26 June 2009.

Determination on the Preliminary Issue

Having considered the issue, the Tribunal finds that claimant's employment terminated on 26 June 2009. Accordingly she had over one year's continuous service with the respondent at the time of her dismissal and the Tribunal has jurisdiction to hear the claim under the Unfair Dismissal Acts.

Summary of the Evidence

The claimant commenced employment with the respondent, a general practitioner, as a medical secretary in early June 2008.

The respondent identified both positive and negative aspects to the claimant's work performance. While she was punctual, neat and tidy her typing skills were a cause of concern. The respondent produced some examples of her typing in evidence showing misspelling, poor punctuation and other grammatical errors. He brought these to her attention on several occasions. He also expressed his dissatisfaction to her several times about using the internet during working hours. The claimant had difficulties accepting constructive criticism and tended to be uncommunicative and uncooperative for a number of days afterwards. The claimant's position was that she has a well-recognised qualification in typing and typing was satisfactory and did not form a major part of her duties. The shortcomings and errors as outlined by the respondent had never been brought to her attention during the course of her employment.

It was agreed between the parties that the claimant would receive a net weekly wage and the respondent would be responsible for any contributions on her behalf. Over the period of her employment, the claimant twice requested and was granted large pay increases and continued to insist on a fixed net wage. When the 1% levy was introduced in January 2009 the respondent had been willing to pay it on the claimant's behalf. However, when the levy was increased to 4% the respondent wanted the claimant to directly pay it but she was resistant to the proposal. The respondent wanted to pay his staff well but had serious reservations about absorbing the increasing burden of the levies.

On or around 18 May 2009, on a day a locum was replacing the respondent, the claimant telephoned a prescription to the local pharmacy. When he raised the matter with the claimant she attributed her action to the fact that the locum was busy but the respondent established that this was not the case. The respondent considered the claimant's handling of the matter to be gross misconduct. While he did not use that term to her at the time he nevertheless informed her that what she did was serious and unacceptable. The claimant's position was that the prescription issue "does not stand out" as she felt she had not in any way acted contrary to standard procedure and denied phoning through the prescription. In cross-examination the claimant stated phoning the pharmacy seeking a prescription for a patient "would be a terrible thing" which would justify "dismissal on the spot".

During their discussion on 20 May the respondent stressed to the claimant and she agreed that she

must pay the levy. However, on Friday 22 May she presented two pay cheques to the respondent for his signature but without having deducted an amount in respect of the levy. The respondent realised that the employment relationship was not working out, that the claimant would not pay the levy and he dismissed. Whilst the combination of the issues outlined led to the dismissal the issue surrounding the prescription was the major factor and it gave rise to concerns for patient safety. He had lost his trust and confidence in the claimant. The respondent had no knowledge of the claimant's pregnancy at this time.

The claimant's evidence was that when she presented the cheques for signature on Friday 22 May 2009 the respondent told her they were made out in the wrong amounts and took them away to enter the correct amount. He returned at 5.25pm, five minutes prior to the end of her working day, handed her an envelope and told her that things were not working out and not to return to work the following Monday. The claimant was shocked and upset at this as the dismissal "came out of the blue." She had never received a warning. She identified a particular occasion, prior to her dismissal, when she mentioned that she mentioned to the practice nurse that she might be pregnant.

The nurse working at the surgery confirmed that she got on well with the claimant and that they sometimes met outside work. She denied the claimant's assertion that she had mentioned to her, prior to her dismissal, that she might be pregnant. Some days subsequent to the dismissal the claimant returned and the nurse carried out a test, which confirmed that she was pregnant. This was when the nurse first became aware of the pregnancy. From her consultation notes taken on the day of the test, the nurse believed that from the claimant's LMP date of 28 April 2009 the claimant would not have known that she was pregnant around 22 May.

There was a dispute between the parties as to the number of days' annual leave taken by the claimant and in particular there was a dispute as to whether the claimant had taken two weeks' annual leave from 18 August to 1 September 2009. The claimant denied taking any annual leave in August and maintained that because she loved her job so much she had only taken one and a half days holidays during the course of her employment with the respondent. The claimant's mother corroborated her evidence that she had not taken two weeks' holidays in the latter part of August 2009. The respondent produced a diary and copies of cheques paid to relief staff to support its position that the claimant had taken extensive annual leave. These show payments made to paid to relief staff covering for the claimant's holidays. The latter show cheques payable to the nurse's daughter who provided cover as a secretary when the claimant was absent on leave from 18 August. As this was a small office the nurse was certain that the claimant was on holiday and away from work on specific dates. The respondent did not operate a set leave year. Each employee's leave year commenced on the day that employee started his or her employment. Therefore the claimant's twenty days statutory leave days commenced on 3 June and the respondent maintained she had taken the bulk of that by the time of the termination of employment.

Determination

The Tribunal is satisfied that the claimant was not informed at any stage that her job was at risk.

Further, on 22 May 2009 the respondent failed to follow fair procedures when dismissing the claimant. In line with natural justice and constitutional justice the employee, at minimum, is entitled to be informed of the case against her and given an opportunity to answer the charges against her (See *Gallagher v The Revenue Commissioner* [1995] ILRM 108). The Tribunal is satisfied that the respondent did not comply with these requirements. Accordingly, the dismissal is

procedurally unfair and the claim under the Unfair Dismissal Acts, 1977 to 2007 succeeds. However, the Tribunal, accepting the respondent's evidence as to his reasons for dismissing the claimant and in particular her mishandling of the prescription in late May as well as her continuing failure to pay her own levy, finds that the claimant contributed substantially to her dismissal. Taking that contribution into account the Tribunal awards the claimant the sum of €8,000.00 as compensation under the Unfair Dismissal Acts, 1977 to 2009.

The Tribunal is satisfied that the claimant received her statutory entitlements under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. Accordingly, the claim under those Acts is dismissed.

Having considered the conflicting evidence in relation to the holiday claim, the copies of cheques paid to substitute staff, in particular for the relevant period in August 2008 and the entries in the surgery diaries the Tribunal finds on the balance of probability that there is one and a half days' leave outstanding. Consequently it awards the claimant the sum of €180.84 in compensation under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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