

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO:

EMPLOYEE

- *claimant*

UD963/2009
MN981/2009

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: Ms. D. Donovan BL

Members: Mr. D. Moore
Mr. M. O'Reilly

heard this appeal in Dublin on 16 February 2011
and 2 June 2011
and 3 June 2011

Representation:

Appellant: Ms. Sarah McKechnie BL instructed by:
Emer Murphy, Eamon Murray & Company, Solicitors,
6 / 7, Sheares Street, Cork

Respondent: Mr. John F. Quirke BL instructed by:
Branigan & Co., Solicitors, No 3, The Bookend, Essex Quay, Dublin 8

The decision of the Tribunal was as follows:

Claimant's Case:

The claimant gave evidence and a detailed account of her qualifications. She commenced employment with the respondent as an Operations Manager for the Republic of Ireland in December 1997. In December 2006 she was promoted to the senior position of Head of Operations Dublin. Her role entailed meeting clients, assessing all projects, compiling quotations for projects and assigning staff to projects amongst other duties. She had carried out this job for a number of years before she was officially promoted to the role in 2006.

Around July 2007 she was informed that a former colleague (SR) was returning to work for the respondent. She was informed he was returning to help them out, as the business was so busy. However

when SR returned to work he became the CEO of the respondent company. The claimant told the Tribunal that she had found SR's manner to be abrupt in the past. She would no longer be the senior person in the company but she told the Tribunal that she didn't really mind, as she really loved her job.

All staff were invited to a one-to-one meeting. SR asked her had she any other skills she could bring to another job and he criticised her work. She was astounded as he had never seen how she dealt with clients and there had never been a complaint from any of her clients. She spoke to her counterpart in Belfast about the matter. She also spoke to one of the owners (EH) who told her there were no plans to get rid of her and did not know why SR had spoke to her in that manner.

On December 20 2007 the claimant was diagnosed with breast cancer. She wrote to the owners of the business (BC and EH) and her fellow colleagues to inform them of her diagnosis on that day. She also informed them that she might have to have chemotherapy and radiotherapy in the future.

On New Year's Day she received a telephone call on her personal mobile from SR enquiring what her future plans were. She told him that she had no answers for him as she was still in shock after her sudden diagnosis. She informed him that she would come into work the following day, do as much as she could and hand over the rest of the work to her colleagues. She told the Tribunal that she felt under a lot of pressure to make decisions about her job when she had been through so much with her health.

In mid January 2008 she was requested to attend a meeting with SR who once again asked her what her plans were. She could give him no response as she had an operation pending in five days time for a mastectomy and reconstruction. She emailed her colleagues and the owners on January 17 2008 to inform her of her surgery and that she would email her assistant (JW) and SR a status list of work outstanding on her desk. She also told JW that if anything urgent came up to contact them in about a week. She thanked them for their good wishes and support. Recovery from the operation was painful and slow.

On January 29 2008 she emailed JW asking for email addresses of colleagues that had mistakenly been deleted. She asked for a work related email to be resent to her and asked could she bring her work laptop at some stage. She told the Tribunal that she expected to return to work in March 2008 and had informed her colleagues. However, on January 31 2008 she again emailed her colleagues (including the owners) informing them the cancer had begun to develop in other places but was still small enough not to need treatment. Her recovery would take another 6-8 weeks but she told them that if some one dropped off her laptop she could keep in touch with them and to ring if anyone needed to ask her anything concerning work.

Some of her colleagues came to see her and she received a number of telephone calls from SR asking for an update on her health and possible return to work. She felt under pressure and was worried. On February 19 2008 she received an e-mail from SR regarding a proposed review schedule of staff. She again received another e-mail concerning it on February 22 2008.

On March 5 2008 she received messages on her work and personal mobile phone from SR again requesting an update on her return to work. The following day she e-mailed BC, EH, JW, SR and another colleague giving them an update on her health and stating that she hoped to return to work on March 31st or April 7 2008. She also informed them that she was to attend her surgeon and the Oncologist on March 27 2008, which may change her return, to work but she still hoped to return in early April 2008. She also mentioned she had appreciated the sick leave cover she had received from the respondent and asked that when this cover finished they would let her know so she could arrange social welfare payments.

She told the Tribunal that her surgery site was very sore at the time and was afraid to leave the house. However on March 7 2008 she emailed SR telling him she was finally able to travel outside the house and was going to Kerry and a week later to France to recuperate but that he could contact her by e-mail if needed.

On March 29 2008 SR emailed her stating how sorry he was for the news she had received concerning her health. He also stated that he would like to talk to her as it was now “heading into April” and he would like to see how “we’re were heading”. He asked to meet on April 7 2008.

She replied that day telling him she may not have any answers for him as it depended on her treatment and she had to see her Oncologist on April 8 2008. She suggested they meet on April 9 2008 instead. He replied saying that would be fine and to meet late afternoon Thursday April 10 2008 or after 4.00 p.m. on Friday April 11 2008. On April 2 2008 she emailed SR telling him that as her future treatment was unclear she would be grateful if he did not schedule her for any further meetings until she had confirmed her return to work date. He replied stating she should appreciate that “discussions about the return to work was a two way dialogue”. He also stated that if she felt her doctor’s appointment on the following Monday would “yield no significant information then we should meet as scheduled on Monday”.

On the same day she emailed the owners – BC and EH setting out her pressurising concerns of SR’s emails, texts and telephone calls to her while she was on sick leave. She told them she felt stressed by his requests to meetings while on sick leave and felt it was affecting her recovery. She also requested they did not forward the email to SR as she did not want “to mar the relationship with him upon my return to work”. She apologised for emailing them as SR had berated her before for contacting them directly when he was her supervisor. She told the Tribunal that she hoped the owners would “step in”.

On April 3 2008 she replied to SR informing him she had had her consultant’s appointment and there had been no firm decision regarding further treatment. She also informed him that she had been issued with another medical certificate for a further 4 weeks and then her doctor would review the situation again and maybe then they could schedule a meeting.

On April 4 2008 she received a reply from the owners. They said they were sorry to hear her treatment had not been confirmed. They told her that although her linking into work while on sick leave was much appreciated it was not a practice they wanted to continue. They said that they had not been previously aware of the stress caused by SR contacting her and said that he was her line Manager and “all work related contact must solely go through” him. She was devastated at the response.

The same day she received an email from SR informing her that her full salary would continue to be paid for April but no longer than that. He also informed her that because of on-going demands in the business meant that in her absence he would have to look at alternative arrangements than the one currently in place to fill her role. She explained to the Tribunal that her counterpart in Belfast had an arrangement that if she was on sick leave she would be paid in full for the first 6 months and half pay for a further 6 months. She was very worried about her financial status.

On May 1 2008 she again emailed SR looking for clarification on her sick pay status. SR informed her on May 9 2008 that he had already clarified the sick pay issue in his previous email. On July 31 2008 she wrote to PK in Human Resources replying to a letter he had sent her regarding a medical certificate. She informed him she would be returning to work in the first or second week of October 2008 subject to advice from her doctors. She suggested a meeting be scheduled in October.

On October 3 2008 she again contacted PK saying she was planning to return to work on October 10 2008 or 13 2008 and requested a meeting be set up with SR before that. He replied the same day suggesting a pre-work meeting on Thursday October 16 2008 at 4.00 p.m. He requested she bring a medical certificate from her doctor to state she was fit to return to work and stated that as she had been absent for some time on sick leave they may request her to see the company doctor. She told the Tribunal that she was shocked at the email and was anxious to return to work. She could not understand why they wanted her to see the company doctor when her doctors had deemed her fit to return to work.

She e-mailed PK and informed him her doctor deemed her fit to return to work on October 10 2008 and

would be happy to meet SR on the changed dates of either October 14 2008 or 17 2008. She was also available to see the company doctor at any time. PK replied stating they wanted to have a meeting with her before she re-commenced work and requested she post her fit to return to work certificate to the office. More e-mails passed between the claimant and PK.

On October 8 2008 PK e-mailed her suggesting the meeting be held on October 17 2008 at 3.00p.m. The meeting would be between SR and herself with a “view to discussing how best to bring you back in to the company. The same day she lodged High Court Proceedings for damages for breach of wilful infliction of mental distress and emotional upset. She was told that a long time has passed since you worked and as mentioned in earlier e-mails we have had to adapt to the uncertain circumstances we find ourselves in and we have had to change. She was told that given your senior position it is not as straightforward as you coming in and picking up exactly where you left off. “Things have moved on.” She felt it was a very hostile e-mail and was devastated by its wording. She could not believe its cold aggressive tone.

Prior to the scheduled meeting on October 17 2008 she attended the company office to arrange her return. She found her desk to be removed and the contents cleared out. She could not find her belongings. She was horrified and felt she was not welcome back. She attended the meeting with SR and PK. The minutes of this meeting were read to the Tribunal. The claimant stated that she felt the minutes of the meeting were not a good reflection of what had been said. She asked SR why her desk had been removed and was told he did not have to give a reason. She was informed she would be located at a desk beside him and would now have a defined set of clients. These clients would not have been in contact with the company since the claimant had left on sick leave. She was told she would have to agree to it but was not given any reasons why. She asked for time to consider the matter. SR told her he was unhappy she was not agreeing to it then and there and told PK she was refusing.

She asked who would be carrying out her role and was told her colleague JW. She told the Tribunal that she felt she was being demoted. She had been assigned a task that the company knew was extremely difficult and felt she was being set up to fail. Her role now consisted of Operations Manager and not Head of Operations. She was given a week to consider the matter but could not return to work unless she agreed to the conditions. If she did not agree to it, it would only go bad for her and the company. She was told not to return to work until she undertook to inform them of her reply but would be paid. It was a very hostile meeting. She told the Tribunal that she felt “ambushed, intimidated and had not expected to be treated with such hostility”.

On October 23 2008 she received an e-mail from PK. She was informed that she had been paid till the previous Friday, the date of the meeting, and was now informed she would not be paid until she made up her mind. The following day she emailed SR and PK saying she was taken aback at the meeting of October 17 2008 and found there were discrepancies between the company’s minutes of the meeting and her notes. She told them she wanted to return to work in her original role and how upset she was to arrive to the office to find her desk removed. She agreed to sit wherever they wished her to sit. She requested confirmation that her return to work would be under her previous working conditions.

SR replied and suggested she speak to the owners – BC and EH to see if they come to a solution. She replied stating she found herself suspended without pay and again requested confirmation of her return to work in her original role. She could not understand why her immediate return to work cannot be facilitated. She also sent this email to BC and EH. A series of e-mails passed between the claimant and the owners.

On October 30 2008 she received a letter from the owners which was also sent to PK and SR. They told her they were perplexed “with hurdles” she seemed to perceive to her ability to return to work. She was assured that her new role was a job to be carried out by a senior Operations Manager. They knew that she was willing to return to work and carry out her duties as SR required them to be addressed. They said that SR had been very clear of all of that and wanted confirmation that she would work with him and all direction he would give her so that they could all get back on track. She was told that EH and

BC were available to meet with her but clearly preferred her to give them assurances that she was willing to return to work with the company and SR and to “let us get back to our desks and get working on the large tasks ahead”. She told the Tribunal that she felt they had turned the tables and did not want to meet her.

She replied on November 3 2008 saying she was anxious to return to work and was willing to work with SR in the interest of the company. She proposed to return to work on November 5 2008. A reply was sent the same day telling her SR had not set any pre-conditions to her return to work, her role had not diminished, an apology for the removal of her desk and informed there was a work station for her. She was also told she would have to be able to carry out duties required by SR. They requested a response by 12 noon the following day.

She was relieved her role was not being diminished. She responded the following day informing them she was relieved her role had not diminished and there were no pre-conditions for her to return to work. She had no issue working with SR who was senior to her. Her concerns were always about her role in the company on her return from illness. She did not find it unreasonable to have her new duties outlined to her in order to carry them out to the best of her ability. If permitted she wished to return to work the following day. Her reply informed her her role would not change but her return to work could not take place until she informed them as to the satisfactory outcome of her deliberations.

She replied that there was no confusion on her part and that she had not been allowed to return to work since October 10th. She found the exchange of emails to be very stressful and could not understand why she had returned to work before. EH and BC replied that two items had arisen at her meeting with SR – whether she could work with him and time to consider some issues. They had been waiting for her positive reply and that perceived inability to return to work was solely awaiting the end of 2008 for her deliberations. She was confused by the contents of the email and felt she had already clarified the situation. She had already stated she had agreed to sit wherever SR asked, they had confirmed her role was not diminished and she had previously confirmed she would take instruction from the CEO (SR). She was ready and willing to return to work since October and found the on-going correspondence extremely stressful and wondered if the company had another agenda.

Later that day she received a response stating she had put words in correspondence that they had not said. Again they informed her her role would be the same but she would now have a defined set of clients. Her use of the phrases “stressful”, “suspension” and “agenda” was a clear misrepresentation of the words they said. They felt there was little point in continuing correspondence and it would be better to meet with her and her representative. They requested some dates and times for the following week to meet.

She had no further contact with the respondent and her solicitor began correspondence with the respondent. On March 24 2009 her solicitor wrote to the respondent stating that as there had been no correspondence since October 2008 the claimant regarded herself constructively dismissed.

On cross-examination she told the Tribunal that SR had told her at a meeting in October 2007 that the biggest issue he had with her was that she did not give the customers what they wanted. When asked for examples he could not give recall any. This upset her. She told the Tribunal that her counterpart in Northern Ireland had not been asked about her skills. She told the Tribunal that she felt targeted. She could not understand why the respondent would not let her return to work as she had been certified medically fit to do so.

Respondent’s Case:

PK from Human Resources gave evidence. He joined the respondent company in December 2007 to cover a position of a member of staff on maternity leave. He told the Tribunal that he was aware of the claimant’s illness but not in January 2008. He was also aware of e-mails being sent around and that there had been tension between the claimant and SR in April.

He became aware the claimant had been contacted and she had replied regarding work related matters. On April 15th 2008 he sent an email to JW and another colleague (CmC) regarding the claimant being on sick leave and informing them that no work related matters were to be communicated to the claimant. It was important that she had time to rest. If the claimant contacted either of them regarding work they were to refer the matter to her line Manager – SR.

He was not aware there was tension between the claimant and SR until April. He explained that when he had joined the respondent company the business had been very “healthy”. However during the summertime business began to decline. In September figures were in a poor state. It was decided that redundancies would have to be made as there was no work for the employees.

There had been emails sent between the claimant and the witness during the summer regarding sick certificates and setting up a meeting. In September he was made aware the claimant was ready to return to work and was happy to hear the news. The claimant contacted the witness regarding her return to work. He informed her that he wanted to set up a “pre-return to work” meeting in mid-October with SR. He also requested a doctor’s return to work certificate. More e-mails passed concerning meeting up and sick certificates.

The meeting took place on October 17th with the claimant, the witness and SR present. He told the Tribunal it was a tense meeting. SR outlined changes to be made.

On cross-examination he stated he could not recall if he had received a copy of the claimant’s email sent to the owners of her concerns and did not know if it had been brought to the attention of SR. When asked he said he was not sure if the claimant had taken notes at the meeting of October 17 2008.

One of the co-owners (BC) gave evidence. She explained the company had been set up in the Republic of Ireland in 1989 and Northern Ireland in 1990. The claimant commenced employment in 1997. In 1999 the company carried out large excavation development. Staff numbers increased and the claimant assisted her with the large projects. By mid-2000 the claimant and a colleague (CMC) developed great expertise. The witness explained the career path of the claimant.

In 2007 SR returned to work for the company which had been discussed with staff prior to his return. He was to return to carry out a specific function. The claimant seemed happy with his return. JW became Operations Manager because of her expertise in field work. In October 2007 the claimant and the witness attended a site and the claimant aired her concerns concerning the meeting that she had one-to-one with SR. The witness told her the claimant was coming in to do a job and did say he had a “clipped manner”. She spoke to SR about the matter and he was surprised.

In December 2007 she became aware of the claimant’s prognosis which was shocking and upsetting. The claimant was upbeat and positive about the situation. During this time the company changed premises to an open plan office.

In February 2008 it had been brought to her attention by SR that group emails had been sent regarding work which included the claimant who was absent on sick leave.

On April 2008 the claimant emailed the witness and her partner regarding her health and SR. The witness was surprised and upset as she had not been aware the claimant was aggrieved. The claimant wanted some work to do but the witness and her partner decided it was not a good idea as she was under enough stress. She replied to the claimant on April 4 2008. She said that although she appreciated the claimant wanted to do some work it was not a practice the company wanted to continue. She was also informed that they were not aware that she, the claimant, had been stressed with the contact made by SR. The witness informed the claimant that they would mention it to him but that he was her line Manager and all work related contact was to solely go through him.

While the claimant was absent on sick leave an advertisement had been placed for an Operations Manager but this had not worked out so the claimant's work was divided between the staff.

The witness told the Tribunal that business had declined and it was difficult to receive payments for work carried out. By September the "alarm bells started to go off". The company decided it would rely on peatlands work and try to get monies owed to them for previous work. A staff meeting was held in September 2008 and staff were delighted to hear the claimant was returning to work.

When asked the witness said she was aware of the meeting with PK, SR and the claimant. She said that the work the claimant was now going to carry out was work she had done in the past and she knew the clients. She also had the talents and skill set for it. One of the old clients was one of the company's biggest. The witness said that she could not understand why the claimant did not want to carry out these tasks and could not understand why she needed further clarification about her role. The claimant was not refusing to do the job but she was not accepting it.

On cross-examination she stated she had a great relationship with the claimant. When asked she explained that all staff had a contract and there was a grievance procedure in place. The witness felt the claimant downplayed her illness but felt that was for the benefit of the owners and staff. She kept emailing she was returning to work. The witness said anyone who had a grievance should have raised it with their line Manager.

She said that the wording of some emails regarding meetings with the claimant for a return to work were not confrontational. The next correspondence was from the claimant's solicitor. When asked she stated the SR left in March 2009. She had accepted the company was in financial difficulty and she was upset to see him leave.

JW gave evidence. She commenced employment with the respondent in 1999. She had worked in the peatlands area as a Site Manager. In November 2007 she was assigned the role of Manager. She had met SR at a one-to-one meeting where she was asked what skills she had and what her long-term aspirations were. The witness had some medical problems and was absent until December when she returned on a three-day week. She met the claimant who filled her in on projects being carried out.

On cross-examination she stated SR had come to her home when she was on sick leave to see how she was and asked when she was hoping to return to work.

Determination:

Having carefully considered the evidence adduced at the hearing and the submissions of the parties the Tribunal finds that the claimant had an entitlement to return to work as soon as she was deemed medically fit to return to work. From the date the claimant's return to work was made contingent on matters other than her being medically fit to return to work the claimant was entitled to consider herself constructively dismissed. The Tribunal finds that the claimant delayed in considering herself constructively dismissed but the Tribunal finds this was because the claimant believed matters could be resolved and it wasn't until March 24th 2009 that the claimant realised this was not the case. The Tribunal finds that this was the date the employment relationship had come to an end. The Tribunal accepts that there was equivocation regarding the return to work by both the claimant and the respondent but the Tribunal finds that this equivocation resulted from the actions of the respondent. The Tribunal finds that the actions of the respondent entitled the claimant to consider herself constructively dismissed.

The claim under the UD Acts 1977-2007 succeeds. The Tribunal awards the claimant an amount of € 90,000.00.

The Tribunal makes no finding as to whether any actions of the respondent contributed to or were capable

of contributing to any personal injury that the claimant may have suffered.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed as this is a claim for constructive dismissal.

Sealed with the seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)