

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD733/10

- claimant

Against

EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr J. Flanagan
Mr A. Butler

heard this claim at Wicklow on 9th June 2011 and 12th October 2011 and 13th October 2011.

Representation:

Claimant: In person

Respondent Ms. Ger Moriarty, Local Government Management Services
Board, Local Government House, 35/39 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:-

Opening statement by claimant:

The claimant had over 20 years service in the public service. In 2005 she found herself in a protracted conflict with another employee who created difficulties for her and there was lack of support from the respondent. Within three to four years the issues were addressed in other forum. There was a failed mediation process. An employee made an allegation of bullying and harassment against the claimant. An investigation was carried out and there was found to be no bullying on either side. It was a sensitive case revolving around another employee and health issues. It began in January 2005. The respondent failed in their duty of care to the claimant. Allegations were also made by the other employee's family. The claimant was in an unsafe environment, she felt that if anything happened to the other employee that she (the Claimant) would be blamed. The claimant felt in an unsafe environment and with a lack of support.

Opening statement by representative for respondent:

The respondent contends that the claimant voluntarily resigned. The respondent discharged its duty of care. The respondent went over and beyond its duty of care. Following the claimant's complaint against an employee the respondent tried to find a solution while exercising its duty of care to the two employees. The claimant was on full pay while absent on sick leave for a period of one year and nine months while there was no entitlement to sick pay during that period.

In the period 2005 – 2007 the respondent did all they could to progress issues in dispute. There was reasonableness and fairness. There was an extension of counselling services. Before the claimant's return to work, a facilitator was engaged. A framework was put in place. The claimant resigned, and availed of early retirement without any reduction in her pension.

It is contended that the claimant had the full intention of retiring early in April 2009. The respondent acted reasonably.

Claimant's Case:

The claimant joined the respondent company, a public authority, in April 1999 as a legal assistant. She had an exemplary career up to that having worked in another area of the public service. The Law Agent (DS) and an executive also worked in that department. The claimant became confident in her work.

Sometime after the claimant's arrival DS asked her to take a look at the filing and title deeds retrieval system and to let him know if it was in line with best practice. She put forward proposals and DS agreed these.

In August 2004 the respondent employed an Executive Solicitor (J). From early on the claimant noticed that this solicitor's attitude towards her was less than friendly.

In early January 2005 the claimant contended that an e-mail sent by J to DS and other solicitors was to discredit her. The claimant was very surprised. She attempted to speak to J about the matter but J became defensive and abusive towards her. J wanted to change the systems in place but when the claimant spoke to DS about them he was in agreement that this was not to happen. J however, changed the systems anyhow.

In 2005 two employees under the claimant's supervision expressed difficulties they were experiencing with J. It appeared that DS was not clearly making J aware of his decisions. The claimant contended she was caught in the middle of this friction.

The claimant spoke to DS on numerous occasions about her difficulties in the office.

There was an outburst from J towards the end of 2005. The claimant recognised this as a very serious situation and believed that J may have been unwell at that time.

The claimant outlined the difficulties in the law department to BB, who had responsibility for personnel matters. BB gave the claimant a copy of the Council's booklet entitled Equality and Diversity and Dignity at Work. The claimant suggested the possibility of an informal meeting and mediation.

The claimant was very stressed and unwell over the Christmas holidays and visited her doctor. She was certified unfit for work from 28th December 2005 for one month due to work stress.

In January 2006 the claimant was notified that mediation was to take place over three days, namely, 8th, 9th and 10th February. The claimant attended the meetings. The mediation process was not handled well. Two draft agreements were prepared, neither of which the claimant signed. DS was brought into the process on the second day despite the claimant's reservations. The respondent was furnished with copies of these agreements. As a result of the mediation process a management study was put in place to make changes on how things had been run. The claimant returned to work in April 2006 but was absent again until July on certified sick leave. The claimant observed that she was being ignored at work. She read the findings of the management study report and saw that her position of senior legal assistant had been downgraded. From August 2006 until January 2007 the claimant was absent on certified sick leave.

In August 2006 the claimant was notified by letter that her salary was to be reduced to half pay. She replied saying that this was unfair but the respondent however proceeded with the reduction in her salary. The claimant received twelve counselling sessions during 2006 under the Employee Assistance Programme.

In November 2006 the claimant was furnished with a copy of a letter from J who made serious outrageous allegations about the claimant.

To facilitate the claimant's return to work, she asked BB to arrange a face-to-face meeting between her and J and also a meeting with DS before she actually returned to work. It was arranged that the claimant would meet DS on 5th January 2007 and return to work on 9th January 2007. The face-to-face meeting with J was arranged for 10th January 2007. J informed DS in advance of that meeting that she did not want to meet the claimant. The claimant felt disillusioned and very vulnerable in the workplace. The matter was not pursued further.

The respondent engaged the services of DN to process the allegations of bullying and harassment made against the claimant. The claimant was happy for DN to act as mediator. J was not agreeable to meet the mediator and wanted her sister to attend such meetings. The mediator was not agreeable to this. J agreed to meet DN on 26th May 2007, which coincidentally was the date for the completion of the investigation. J had one meeting with the investigator.

During this time the claimant became very despondent at the lack of progress with the investigation. Because of the stress in the workplace the claimant met with the respondent's medical doctor on 26th April 2007 and again on 8th May 2007. At this time the claimant became completely stressed by the strain of the situation. The claimant's complaints about J remained outstanding and there was an unacceptable work situation.

The claimant was again certified unfit for work in mid July and her GP wrote to the respondent requesting that the protracted matter be resolved due to the effect it was having on the claimant's health.

Several Rights Commissioners hearings took place in August, October and November 2007 and again January, March, June, July and September 2008. She accepted the Rights Commissioner's findings but did not agree with every single point in her recommendation. She received a sum of €15,000.00 for the distress caused to her. She did not appeal the Rights Commissioner recommendation. The respondent agreed not to reduce the claimant's salary or take her off the

payroll.

DN issued his report in March 2008. In his findings he concluded that the allegations made by both parties did not constitute bullying and recommended that the respondent should facilitate some form of mediated/facilitated meetings between the two parties to address the issues.

Facilitated meetings were arranged in February and March 2009. J attended one meeting. The parties signed a confidential clause. Confidentiality was breached as the claimant heard from a colleague that details were out all over the office.

The claimant returned to work on 14th April 2009 on a phased three-day week. She was permitted to offset her annual leave for the remaining two days in the week. She determined the days she worked each week. She tended to keep her office door closed. She tried to build relationships. She felt hugely traumatised, isolated and very vulnerable. The substantive case had not been resolved and was hanging over her. She was in a state of anxiety. The claimant had no confidence in the respondent. It was an impossible situation and there was no sense of security.

In May 2009 she spoke to DS about her concerns. Her health disimproved and she remained working on this phased basis until December 2009.

She discussed her pension entitlements following her return to work in April 2009 with DK and had subsequent meetings with him over the following months. These meetings took place in her office.

A colleague gave her a copy of a memo dated 10th February 2009 from DS to TM. In that memo was a new allegation being made by the sister of J who alleged that the claimant was the cause of bullying and harassment of J. It was highly prejudicial to her. She could not believe what she had read and felt very vulnerable in the office.

The claimant contended that the respondent could have discussed an alternative role for her. She felt imprisoned in an unsafe office. She felt deeply let down. The respondent had failed in its duty of care to her. She contended that there was no safe way for her to make a complaint. The claimant felt her position untenable and tendered her resignation on 8th December 2009. She contended that she was forced to resign due to lack of support from the respondent.

Since the termination of her employment she has applied for several positions. While she secured work in a solicitor's office in early 2010 she felt she could no longer work in the legal area and subsequently left. She also ran as an independent candidate in the general election in 2011 but was unsuccessful.

Respondent's Case:

The respondent is a public authority. DS is Law Agent and head of the Law Department since 1997. The Department comprises of one senior executive solicitor, two executive solicitors, one senior legal assistant, one legal assistant, one assistant staff officer and two clerical officers.

A management study was carried out by LG, an independent consultant, in the law department in 2006 and all staff participated in the process. The recommendations of that report included training and an adjustment to the PMDS process. DS had no specific HR skills and benefited from a HR course he attended over two full days in 2008. Office meetings were introduced and technical staff attended the first half of the meeting and administrative staff the second half. The claimant

attended the full meeting.

Facilitated meetings were arranged and the first such meeting took place on 10th February 2009. The facilitator JmcA discussed the importance of confidentiality at that meeting and DS never discussed the meeting with anyone or heard any discussions in the office. He felt progress was made as the claimant wanted to move on. It was agreed a second facilitated meeting would take place in March 2009 and all signed a confidentiality clause. At the conclusion of the meeting on 27th March 2009 the parties agreed to abide by suggested agreements and everyone felt there was a way forward.

DS contended that the claimant's expectation was a little too high and she expected more from J. J had not been forthcoming in the process and there was little or no social interaction from her. The objective was to facilitate the claimant's return to work.

After the first facilitated meeting on 10 February 2009 DS received a phone call at approximately 5 pm from J's sister (L). He noted what she had said, did not comment but told J that he would pass the matter to HR and he documented it in a memo addressed to TM, Director of Services. L said that the facilitator threatened J with dismissal and this issue concerned him. L alleged that J's ill health resulted from the claimant's bullying and harassment. He hand delivered that letter directly to TM and did not retain a copy.

On 6th/7th April 2009 he was advised of the claimant's return to work following sick leave. As he was going to be on annual leave at that time he asked IM to ensure the claimant was made feel welcome. Following his return to the office he held a meeting with the claimant. The claimant said that J was ignoring her. DS contended that staff had behaved with respect towards both the claimant and J. He invited the claimant to do other work in the area but she declined that offer. The claimant tended to keep her office door closed.

The claimant was invited to a lunch with staff on her return to the office following her days off but declined that offer.

On one occasion the claimant had inadvertently left her diary in the administration office and she felt her diary had been read to some extent. She complained about this but DS felt it was not justified and she said she was going to resign.

The claimant was facilitated on her return to work by working a three-day week and using her accrued annual leave the remaining two days in the week. The claimant chose her own days to work and DS accepted this. BB in HR had asked him if he saw any problem with this arrangement and he did not.

Team meetings were held in May and June 2009. In the second two meetings the claimant was positive and upbeat. J had no great comment to make. DS invited the claimant to coffee ten or twelve times but she declined to meet him and she did not feel up to it. He wanted her to recognise that he was being supportive. Every ten days or so he walked around the office and witnessed that J was cold with the claimant on a social level.

The claimant intimated in late August 2009 that she was going to retire. As DS was going on annual leave for some time he asked her if she would stay until he returned and the claimant said she would think about it. She did not appear to be enthusiastic about it. The claimant had flagged as early as 2007 that she would be of an age in 2009 and could opt for retirement.

In a meeting he attended with the claimant towards the end of November 2009 the claimant requested it be held without prejudice. The claimant alluded to emails and to the letter/memo he wrote to TM. He was surprised that she had a copy of that memo in her possession. She did not make a formal complaint about the allegation contained in the letter. He asked her how she secured a copy but she declined to say. He asked her what she was trying to achieve and he received no answer. It never occurred to DS that the claimant might wish to work in another area in the respondent company. DS contended that there could have been a personality clash between the claimant and J.

At a meeting DS held with the claimant in December she said that she was retiring in the next few days and she asked him not to inform her colleagues.

DK is internal auditor. In April 2009 the claimant contacted him in relation to her superannuation entitlements. He had a strong indication that the claimant planned to retire. He held further meetings with the claimant in her office, which were courteous, business like and polite. On one occasion the claimant locked the door. He felt it appropriate to mention to BB that he had been in the office with the claimant when she had knocked on the door on one occasion. The claimant never appeared distressed. So as to prepare figures for the claimant he used the date of 23 October 2009.

In an email dated 15th October 2009 the claimant confirmed that she would not be proceeding with the date of 23 October 2009.

BB is Personnel Officer and is in that role since 2001/2002.

The original memo written by DS on 10th February 2009 following a facilitated meeting that day, to TM was given to her and was placed on the complaints file. She discussed the contents of that letter with TM and she spoke to JmcA about the reference to her in that memo concerning J's perceived threat of dismissal. BB was confident there was no such threat and wrote to JmcA accordingly. BB deemed the remark and allegation to be an emotive opinion given by a relative and saw no truth in it. The claimant had never brought it to her attention and she had been taken aback as to how the claimant had access to the letter. At the very least she would have spoken to the claimant and reassured her that it was just an opinion. BB had a good relationship with the claimant. The claimant had ample opportunity to show the letter to her.

Prior to the claimant's return to work in April 2009 following a period of sick leave, she discussed with the claimant her wish to work a three-day week. As the claimant's annual leave of 29 days had accrued, she approved her request to use her annual leave for the remaining two days each week until her annual leave days had been exhausted. DS had no problem with this arrangement.

BB welcomed the claimant back to work and had ongoing contact with her. She offered to meet the claimant for coffee on several occasions but the claimant said she found it difficult to go to the canteen. BB also kept an eye on J during this time and J did not appear to have any issues.

BB contended that all findings of the investigation report were implemented.

On 9th October 2009 the claimant intimated to BB that she was going to retire. She did not really want to but felt she had no option because in her opinion nothing much had changed. J had been on sick leave since 10th August 2009. BB advised her not to make any hasty decision and asked her to think about some counselling or some coping mechanism. BB contended that the claimant was

unclear about her issues.

The respondent was fearful of redeploying the claimant as she was in a specialised role and there could have been a perception that she was being moved on. BB felt outstanding issues could have been resolved given time. BB was satisfied that all that was done that could have been done for the claimant.

Determination:

The Tribunal carefully considered the evidence adduced during the course of this two and half day hearing. There were substantial detailed submissions made by both parties.

In assessing whether or not the claimant in this matter was constructively dismissed, the Tribunal has assessed the evidence adduced and the related legislation in relation to Constructive Dismissal and in particular the test as set out in the Unfair Dismissals Acts. The onus of proof is on the claimant to prove that she did not voluntarily resign from her employment and that the termination was due to the conduct of the respondent, leaving the claimant with no alternative or that it was reasonable for the claimant to terminate the employment.

It is for the Tribunal to consider if the actions and behaviour of the respondent were so unreasonable that it was reasonable to expect the claimant not to tolerate the behaviour. The conduct of the respondent is crucial.

The Tribunal is of the view that local management at the initial stages failed to recognise that there was a serious interpersonal relationship problem and this failure contributed in no small way to the problem in the office.

The Tribunal accepts that the respondent in this matter did everything possible they could and acted reasonably in the circumstances. It was an unfortunate situation. Further, the claimant did not make any formal complaint and did not invoke the grievance procedures. It is not accepted that the claimant was forced to resign from her position.

The Tribunal finds that the claimant was not constructively dismissed and therefore her claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)