

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE-*Claimant*

CASE NO.  
UD145/2010  
MN148/2010

against  
EMPLOYER-*Respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. T. O'Sullivan  
Mr. P. Woods

heard this claim at Dublin on 21st April 2011 and 29th September 2011

Representation:

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Claimant: Mr. Padraig Mullins, Kelly Noone & Co., Solicitors,  
Taney Hall, Eglinton Terrace, Dundrum, Dublin 14

Respondent: Mr. Peter Quinn, Sheridan Quinn, Solicitors, 29 Upper Mount  
Street, Dublin 2

The determination of the Tribunal was as follows:-

This being a claim of constructive dismissal it fell to the claimant to make his case.

#### **Claimant's Case:**

The claimant EB began work for the respondent organisation in April 2008 as a co-ordinator. She had a background in teaching in psychotherapy and always worked in mental health. It was a self- help organisation with a head office in Chicago based in a hospital compound. Initially she reported to DG the area leader but his position changed and she then worked to BT. Employment was uneventful until an incident occurred on 25<sup>th</sup> February 2009. EB was doing her work as normal on the computer; she hit the mouse and found a lot of files which contained pornography. There were 10/12 pages of adolescence, the pictures were visible but she did not open them any further. The office was manned by herself and DG, there were 2 computers, one belonging to her organisation and one belonging to the HSE. There was no password required to access her

computer.

EB worked four days per week and treated the desk as her own.

DG worked from home or came into the office the odd evening.

BT did not use the office but could access the computer from home; he was involved in IT and had provided the computer.

Security and cleaning staff also had access to the office.

EB was shocked and upset at the content, she was afraid of being connected to it. People asked what was wrong, but she didn't say, she only told one person who witnessed the content.

EB did not report the issue straight away. When she did it was to two members of the HSE.

Asked what she wanted to do about it she said she wanted the computer removed.

DG was on holidays and she arranged to bring it to his attention on his return.

She met with him and it was a difficult conversation, he was upset and went into detail as to who could be responsible. She asked him to remove the computer but he said no, it might look like he had something to do with it if he did.

DG telephoned the next morning to say he couldn't meet or speak with her on advice from his solicitor.

EB felt she was left in limbo, she rang head office in Chicago and they hung up on her. She telephoned them again from home and was told by somebody in head office that she could be sued for allowing somebody from outside of the organisation to see the computer but they would have a meeting and get back to her. That never happened.

She later received a telephone call from BT who asked that they meet. This was at 4.30 pm on 5<sup>th</sup> March 2009.

He was angry that she had told head office and told her she was suspended with pay from doing any more work, she asked for this in writing, he insisted he had the authority to suspend her and asked for the keys to the office.

EB asked the management of the building if she could give over her keys and was told "under no circumstances" but the computer could be removed for examination.

BT was very aggressive and EB felt frightened. She got somebody to come and take her home.

She wrote to head office on 10<sup>th</sup> March requesting information on their policies and procedures and on 16<sup>th</sup> March received a letter from BT stating that she was offered mediation with an independent employee assistance programme. On 19<sup>th</sup> March she received a formal letter of suspension until her complaint against DG was investigated and resolved.

She never made a complaint against DG.

EB had her solicitor write to BT and head office in Chicago on 26<sup>th</sup> March requesting details of the suspension and the employment assisted support she had been offered. She then received a letter from BT on 30<sup>th</sup> March stating that communication with head office was irrelevant because her contract was with the Irish organisation. BT's solicitor wrote back expressing shock that the investigation was being carried out by someone heavily involved in the initial complaint.

An external company was employed to investigate the events in July 2009.

MB felt that she was the one being investigated and that she was being called to account.

The investigation did not focus on her being suspended and implied that she was the one who had done something wrong.

MB had two complaints, the pornography on her computer and BT's behaviour.

At no time was BT's behaviour addressed and the computer analysis was never mentioned. The computer was with BT for several months before the investigation.

The investigation concluded and a report was issued on 4<sup>th</sup> September 2009.

On 13<sup>th</sup> October MB's solicitor wrote to the respondent organisation rejecting the report as offering no solutions to the issue. She did not go back to work as the images and her suspension have never been addressed. The action plan was silent with regard to BT and it was as if she had exaggerated the initial sightings on the computer.

Under cross examination MB stated that the images were of adolescents under the age of 18. She did not ask someone from the HSE to remove the images but did ask for the computer to be removed and have the HSE one installed.

Asked how many images she witnessed she stated that she didn't know for sure but probably hundreds.

The report only stated that one image was found but she and another person had seen them.

She had done nothing wrong but was made to feel accountable.

DG had been suspended as well but was back to work much sooner than her.

She rejected the fact that the report was in her favour, she had no trust or faith in it and was suspended by somebody who was not her boss. The report did nothing about the pornography on her computer. MB did avail of six counselling sessions but it wasn't adequate.

She did consider going to the Gardai but thought that the organisation would investigate properly.

She felt that she had no option but to resign from her position which she did in a letter from her solicitor to the respondent organisation on 17<sup>th</sup> November 2009

MB was on a fixed term contract which had been extended. It was due to expire in April 2010 but the schools she worked for were looking for re-assurance she would still be there. DG confirmed to her that the contract would be renewed.

JM gave evidence to say that he was involved with a programme for children with mental health issues. The claimant worked for the programme and there was no question about the fact she was going to run it, it would be a two or three year programme.

### **Respondents case:**

DG stated that he was the regional manager of the organisation for Europe.

The organisation helps people with mental health issues and relies on HSE funding and contributions.

He did not have any conversation with the claimant about her contract being renewed, he wouldn't have been in a position to extend it and would only know if and when he got the funding.

The claimant had not been replaced when she was suspended but BT may have stepped in to do some of her work.

BT did have IT experience, he supplied and installed the computer and the organisation paid for it. He also had remote access to it.

On DG's return from holidays 3<sup>rd</sup> March, he met with the claimant. She told him images had been found on the computer. MB gave him two options (1) take the computer away or (2) hand the situation over to the Gardai.

After the meeting he rang BT and when he went home he rang head office in Chicago. The CEO in Chicago was unavailable so he got no answers. The next morning he rang three managers in the

HSE and still got nobody. At this time he contacted his solicitor.

He had a long conversation with BT and talked to head office in Chicago again, a girl in the office there said if it happened in Chicago both people would be suspended.

He rang BT and passed on the information.

DG was suspended by BT on 11<sup>th</sup> March and was told it was instructions from Chicago.

He was aware that an independent investigation was being carried out in July 2009. From the findings in the report an action plan was implemented and he returned to work in early September.

Under cross examination DG stated that he was in a paid position and reported to the chief executive in Chicago.

BT and EB both reported to him. Asked to clarify his suspension by BT he stated that he had received an e-mail from head office to say that BT was looking after things and he accepted that.

DG's wife passed away during that time, otherwise he would have been more involved in the investigation.

Asked if he felt EB was implicating him he said that she said information was saved to the computer on a Friday and it was the day he worked in the office.

DG did not know who had removed the computer, he did not know anything about BT's conduct towards the claimant and no action was taken against him, he was a volunteer.

When the computer was checked by the independent investigation it held one image only downloaded on 3<sup>rd</sup> Jan 2009 which was a Saturday.

Regarding the claimant's contract DG stated that she was on 42K per year and with expenses her salary was close to 60K.

HSE funding was reduced from 70k in 2008 to 50k in 2009 and 46k in 2010. Her absence did not impact the level of funding received but they would not have been able to continue paying her.

Renewal of her contract would have predominately depended on funding.

SW HR consultant stated that her company investigated and produced a report on the issues.

Her company was appointed in July 2009 after a meeting with BT. He handed her a folder with copies of all the correspondence to that date.

On 24<sup>th</sup> July a letter was sent by the HR company to EB informing her of the company's involvement and arranging an interview for 5<sup>th</sup> August 2009.

The interview consisted of a series of questions and SW took hand written answers and the same interview took place with DG and BT.

The answers were read back and MB was asked if she wanted to change anything. The HR company did ask to interview HSE staff but were told that they were not interested, it had nothing to do with them.

A forensic investigation of the computer showed over two thousand corrupt files and only one image.

The report found that there was one image on the computer, it upheld the complaint of bullying, found that the suspension was unwarranted and recommended that management training should be put in place.

### **Determination:**

The claimant is alleging she was constructively dismissed from her employment with the

respondent. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

*“ the termination by the employee of her contract of employment with her employer whether prior notice of the termination was or was not given to the employer in the 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 employee to terminate the contract of employment without giving prior notice of the termination to the employer”*

The burden of proof, which is a very high one, lies with the claimant. She must show that her resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to termination the contract was a reasonable one.

The claimant was employed with the respondent since July, 2006. There was no issue with the claimant until the 25th February, 2009 when the claimant alleges she found multiple images of a sexual nature involving minors on her computer at the respondent's premises. She did what any responsible employee should do and reported the matter immediately to two HSE managers. She didn't report the matter to DG until he returned from his holidays on the 4th March. She requested that the computer be removed immediately. The Claimant also attempted to report the matter to her head office in Chicago but when she did attempt to give details of her finding the lady hung up. She attempted to call again later from her home phone and was told this time that she could be sued as she had shown the images to a third party. The claimant then met with BT. He was extremely annoyed with her for reporting the matter to Chicago and he suspended her. She was removed from the premises in the presence of others. DG was suspended too. On the 16th March, 2009 BT wrote to EB in relation to a complaint against DG. The tribunal finds that content of that letter bizarre taking into account the happenings over the previous three weeks. BT writes to EB again on the 19th March formally notifying her that neither she nor DG should undertake any work until a full investigation had been carried out. It should be noted that the matter under investigation was the very matter that EB had reported. The investigation didn't commence for several months. That left EB in a very difficult position. She works in a very sensitive area with adolescence. The fact that she was left suspended for such a length of time without explanation coupled with the nature of the investigation undoubtedly damaged her reputation. When the investigation finally took place it did not focus on the sexual images found, why only one image remained on the computer, why BT was allowed to remove the computer to his own private residence for a significant period of time prior to it going for analysis, why so many corrupted files were found on the computer, why EB had been left out suspended for such an extended period of time. The report that emanated from the investigation was very weak and inaccurate in parts and contained uncorroborated hearsay. EB took issue with the findings and she felt that a cloud of doubt was still left hanging over her. The tribunal find that the claimant was justified in feeling the way she did.

Following the publication of the report EB was reinstated. The claimant stated that she could not return to work with that cloud of doubt still hanging over her and her reputation. In some lines of work that may not be so significant. However given the nature of the claimant's work it is of enormous significance.

The Tribunal find that no grounds existed to justify the claimant's suspension, particularly as it was carried out by a man whose role in the matter was seriously flawed and questionable. She should not have been left suspended for such a significant length of time. She should not have been placed in a position leaving others/ clients to question her reputation. The company had no specific procedure in place to deal with such an issue. It would seem that Chicago had no procedures in place either. The respondent did owe claimant a duty of care, which said duty was breached. The respondent fundamentally breached the claimant contract in that they prevented her from carrying out her contract duties from the middle of March to the middle of September, 2009 without justification.

The tribunal are satisfied based on the evidence adduced that the claimant's contract would have been renewed had this issue not occurred.

The tribunal find that not only was there a breach of the claimant's contract which prevented her from carrying out her contractual duties but also that in all the circumstances it was reasonable for the claimant to take the approach she did.

The Tribunal find that the claimant was constructively dismissed and award her the sum of € 15,000.00

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

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

