

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD1503/2010
RP2022/2010
MN1441/2010
WT622/2010

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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 N. O'Carroll-Kelly BL

Members: Mr F. Moloney
Mr. P. Woods

heard this case in Dublin on 16th November 2011
and 1st February 2012

Representation:

Claimant(s):

Ms. Maeve Brennan BL instructed by
Ms. Claudine Hanratty, Claudine Hanratty & Company,
Solicitors, 1 Main Street, Tallaght, Dublin 24

Respondent(s):

Ms. Bernadette Kirby BL instructed by
Frank Ward & Co., Solicitors, Equity House,
Upper Ormond Quay, Dublin 7

The determination of the Tribunal was as follows:-

Claims were lodged on behalf of the claimant under unfair dismissal, redundancy, minimum notice and working time legislation in respect of employment from May 2006 to January 2010.

The Tribunal was given a statement on behalf of the claimant that she had been employed as a beautician at a salon from May 2006 but that about August/September 2009 she became aware that the respondent's husband (TW) was acting unusual towards her by making a huge effort to speak to her and to get her attention. He allegedly started to ring the salon and say rude things to the claimant when she answered. On one of these occasions the claimant allegedly spoke to a work colleague (LG) and voiced concern as to how TW was behaving towards her. The claimant jokingly suggested that TW fancied her and explained a number of the alleged inappropriate incidents and LG allegedly agreed with her. This allegedly occurred just before the claimant's relationship with the respondent started to deteriorate. The claimant believed that LG might have spoken to the respondent about what the claimant had said.

It was also alleged that the respondent would never want to get involved if the claimant, having had difficulty with a colleague, wanted the respondent's advice and that this led to more stressful working conditions between the claimant and staff. This allegedly got to the point that the claimant would regularly consult the manager of the hairdresser's on the ground floor for advice. The hairdresser's was also owned by the respondent.

It was further alleged that, in the claimant's last two years of employment, the respondent, when unhappy with staff performance, would take items from shelves and presses, throw them around the salon and then tell staff to clean them up. Another allegation was that the respondent was extremely intimidating and that, despite the claimant's best efforts in trying to reason with her, the respondent became very aggressive and threatened staff with their jobs.

A dental appointment for the claimant around October 2009 allegedly led to the respondent criticising the claimant's teeth and banning consumption of sweet things during lunch-hour.

The respondent's business and TW's business generally had a joint Christmas party. A November 2009 date suggested by the respondent clashed with a prior arrangement made by the claimant. It was alleged that the respondent, having told the claimant that she would choose another date, deliberately booked the Christmas party on the night that the respondent knew that the claimant was not able to attend but, when the claimant asked her about this, the respondent said that the claimant had got it wrong.

Regarding TW, it was alleged that he had asked the claimant if they were not good enough for

her and commented that he had missed her at the party whereupon she told him that she had made other plans whereupon he said that she should have changed her plans.

In December 2009 the respondent invited all her employees to her house after the business closed for Christmas. They had decided to buy each other presents and the claimant got the respondent. The claimant bought the present but forgot to take it to the party and offered to deliver it over Christmas whereupon the respondent said that the claimant could give it when she next saw the respondent. After the party the staff had presents in black bags. The claimant mistakenly took one of the respondent's presents. Once home, the claimant contacted the respondent who said that the claimant could return the present at work in January. However, when the claimant returned to work, the respondent allegedly asked the claimant about her present in front of other staff telling them that the claimant had bought her a present and then had taken it back whereupon the claimant felt embarrassed.

About one week later, LG's grandmother had died and the respondent's business was closed due to heavy snow. The claimant texted LG her condolences and returned to work on the Saturday (9 January 2010) the funeral having taken place the day before. It was alleged that the respondent had said that the claimant was "lucky she turned up considering she had the cheek not to go to the funeral yesterday".

It was alleged that the respondent subsequently was in a very bad mood, giving out about small issues and muttering criticism of the claimant under her breath (while the claimant was with a customer) causing the claimant to be extremely embarrassed.

The respondent then allegedly started disconnecting the beauty salon computer (and cash till) and carrying them downstairs. It was also alleged that the respondent started complaining that the salon was scruffy (and that she could get someone else to run it) despite the fact that time had been spent cleaning it. It was alleged that the respondent, moving a reception desk into a very small space beside a wall, asked the claimant if she was sure she could squeeze herself in there and that the claimant took this as a derogatory comment (about her weight) which she found very hurtful and personal especially as it was alleged that the respondent had regularly criticised the claimant about her intake of food.

On 14 January 2010 the claimant said to the respondent's hairdressing manager that the claimant needed more stock whereupon the claimant was told that the respondent should be consulted. The respondent was texted and replied that she had bought stock before Christmas

and that staff must have been eating it up. The claimant asked if the respondent was implying that the claimant was robbing and walked out of the salon that day.

On behalf of the respondent there was a vehement denial of the claimant's allegations and it was stated that the claimant had terminated her employment of her own volition without giving any prior notice.

Determination:

The claimant is alleging she was constructively dismissed from her employment with the respondent hair and beauty salon. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

“ the termination by the employee of his contract of employment with this 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 took issue with the way in which KON’s husband spoke to her on the phone. The claimant could not be specific as to how many times he spoke to her in an inappropriate manner nor could she be specific as to what exactly was said on each occasion. She did in her evidence give examples of the type of things that were said to her. Even taking the claimant evidence in the absence of the respondent’s conflicting evidence, the nature and tone of the phone calls were mild and of themselves would not have affected the claimant’s ability to carry out her contractual duties nor was it reasonable for the claimant to terminate her employment as a result of them. The Tribunal notes that the claimant did not make a formal complaint about this issue.

Secondly, the claimant took issue with KON’s behaviour whilst in the salon. There was a complete conflict of evidence in this regard. Several witnesses for the respondent stated that they had never witnessed KON shouting or throwing things around the salon. They all stated that it was a pleasant environment to work in and that the claimant and KON were the best of friends both in and out of the salon. There was also evidence that up to and including Christmas eve that claimant and KON were very friendly towards each other. The claimant never made a complaint of any sort in relation to KON’s behaviour. The tribunal prefers the respondent’s evidence in relation to this issue.

Thirdly, the claimant took issue with personal comments KON allegedly made about her teeth and her weight. There was no evidence to suggest that the alleged personal comments were uttered more than once. Again there was a conflict in the evidence. The Tribunal can’t be clear as to whether these comments were said or not but even if they were, the claimant did not make a formal complaint. Furthermore, she remained friendly with KON afterwards and of themselves the comments are not sufficient in law to discharge the claimant’s burden of proof.

Having heard testimony from the claimant, the claimant's father and numerous witnesses for the respondent, the Tribunal is not satisfied that the claimant has discharged the onerous burden of proof. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The claims lodged under the Redundancy Payments Acts, 1967 to 2007, and under the Organisation of Working Time Act, 1997, were not proceeded with and are deemed to have been withdrawn.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is dismissed. The respondent was not in breach of the said legislation because the employment

was terminated by the claimant.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)