

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*

UD1087/2010

Against

EMPLOYER – *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T O'Mahony BL

Members: Mr. P. Casey
Mr. J. Flavin

heard this claim in Cork on 19th September 2011

Representation:

Claimant: Ms Deirdre Kennedy, David J O'Meara & Sons, Solicitors,
Bank Place, Mallow, Co Cork

Respondent: Mr. Brian Leahy BL instructed by Mr. Ciarán O'Keefe, M.J.
O'Callaghan & O'Keefe, Solicitors, New Market Square,
Mitchelstown, Co Cork

The determination of the Tribunal was as follows:-

This is a claim for constructive dismissal

Summary of the Evidence

The respondent is a veterinary surgeon whose practice cares for small and large animals. His original clinic was in Town A .In July 2006 he decided to open a second surgery dedicated to small animals in Town B. The latter business grew and he eventually moved to a larger clinic there in early 2009, which was a major financial undertaking.

The claimant began working for the respondent in October 1997 as an administrator.

She was also involved in the TB testing of animals and qualified to dispense some medicines. She had a steady relationship with the respondent. PT commenced working for the respondent on a part-time basis in autumn 2007 working 9 hours per week as a bookkeeper and it suited her to work mornings.

In January 2009 the respondent handed a wages cheque to the claimant which was €46.00 less than her normal wages packet. The respondent told her that he had to cut her wages. On apprising the respondent that NERA informed her that her wages could not be reduced without her consent he re-instated her full pay and repaid the amount deducted and at his request she cancelled her application to NERA.

In April 2009 the respondent queried with her doctor a medical certificate, she had submitted in respect of a short absence.

In July 2009 the respondent gave her a draft contract of employment and in September 2009 she signed a revised draft contract. The claimant agreed that she ably negotiated this contract; she had got advice on it and was happy with it. .

At the end of September 2009 the claimant was surprised when the respondent installed a CCTV camera system on the wall behind her desk. She believed it should have been installed inside the main door where it could capture people going to the drug store. She wrote to the Data Protection Commissioner, who having communicated with the respondent, advised her that it was not being used to record staff.

When the claimant gave the respondent four weeks' notice that she intended taking six days holidays he told her she could not carry over annual leave. This had not happened before.

In 2009 the large animal business was on its knees. In early October 2009 the respondent advised the claimant and PT that their combined working hours were to be cut by 9 hours and suggested that they agree on the particular reduction in each of their cases between themselves. As they did not agree on the reduction within the week allowed (the claimant had suggested a cut of 4.5 hours each and PT had suggested a 20% cut in each of their weekly hours) the respondent made the decision and opted for a 20% reduction in each case resulting in a reduction of seven hours for the claimant and two for P; he felt each employee had to have a feasible number of hours. He informed them of his decision at a meeting on 15 October. The claimant was unhappy with the decision. He told them that the reduction would be reviewed in the future. The claimant felt that PT came and went when it suited her. Within two hours of the meeting the claimant indicated to the respondent that she was unable to work Friday afternoons although she had worked them over the previous ten years. Thereafter, the parties entered on a course of correspondence. In her letter of 29 October the claimant stated *inter alia*: "*Whilst I appreciate the efforts being made to ensure ... continued and viable work in place for both employees, I would welcome the opportunity to discuss the matter in more detail with you including not only the division of working hours between [PT] and me, but also as to division of duties.*" The claimant also offered, in her letter, to work in the clinic in Town B in order to make up the hours that she had lost and she sought to discuss further the division of hours and duties between PT and herself. The respondent's position

was that the practice in Town B was a small animal practice which required a different skills set. The respondent's position was a consensus had been achieved and the matter resolved at the meeting on 15 October.

In his letter of 13 November the respondent outlined a number of concerns he had with the claimant: the fact that she had failed to disclose a conversation with one of the respondent's client wherein he indicated to her that he intended taking his business from the respondent, contacting the respondent's bank about setting up a standing order and opening letters clearly marked for the respondent. The letter ended with a written warning to the claimant. The respondent felt hurt and aggrieved that the claimant had not told him about the client. The claimant's position was that the client had been a family friend and he had not been too polite about the respondent.

In her reply of 25 November, the claimant explained that her recent contract provided for payment by direct debit and that her bank was demanding that that her wages be paid into her mortgage account. In this letter she suggested that they meet to discuss her duties. There was a dispute between the parties as to whether the claimant had opened post addressed to the respondent marked "private and confidential".

In her letter dated 1 December 2009 the claimant indicated that she wished to have some days she had been absent in 2008 and 2009 taken as *force majeure* leave. She had never taken *force majeure* leave before. The respondent maintained that the claimant had understated the time taken as *force majeure* leave. In his letter of 2 December the respondent asked her to make a list of her day-to-day duties. She kept a diary for two weeks and listed her duties as requested.

In her 30 December letter the claimant requested a full days' pay for both Christmas Day and New Year's Day since she could not now carry forward days from 2009 to 2010. In his letter of 3 January 2010 the respondent indicated that he was still waiting for the list of her daily duties. In a further letter of 19 January 2010, the respondent wrote to the claimant about the transfer of bills from one clinic account to the other and, in reply to the claimant's request, he clarified that legally she was not entitled to a paid break because of her hours of work but he would allow her a five-minute break in the mornings.

The respondent then raised an issue about the claimant's leaving the office to go to the pharmacy to get medicine for her son. This had never been an issue before.

The claimant's position was that she felt awkward and stressed at work and on 26 August 2010 her doctor certified her unfit for work. The claimant felt she could not work for the respondent anymore. On 15 February 2010, the claimant wrote to the respondent, giving 4 weeks' notice of her resignation. The respondent's position was that the claimant had not mentioned in her letters that she was suffering from stress.

The respondent was shocked on receiving the claimant's letter of resignation and wanted to convey to her that her job was still available. He telephoned her a few times but she did not answer his calls. He called to her home in the evening but the claimant was unavailable and the person he met told him she was going to bed. The respondent communicated his shock on receiving her letter and asked that that the claimant

contact him and indicated that her job was still available. The claimant did not contact the respondent.

The claimant accepted that she did not invoke the grievance procedure in her contract of employment; the only person she could go to was the respondent and it was with him she had the problem.

The respondent worked late and may have not seen the claimant during some days however they always were in contact by telephone.

Determination

Section 1 of the Unfair Dismissals Act 1977 defines dismissal:

“ dismissal” in relation to an employee means –

(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer,”

In this case the Tribunal examined the facts of the case to determine whether it was reasonable for the claimant to terminate her contract of employment because of the conduct of the employer.

There had been a good relationship between the parties over the period of employment until 2009 when the relationship began to deteriorate. Whilst the Tribunal finds that the problems in the work relationship arose due to some fault on both sides and that the heavier onus to resolve it lay on the respondent it was vital in such circumstances, in particular where the respondent was not aware that the claimant was suffering from stress, that the employee invoke the grievance procedure to focus the employer's mind. Thus, the Tribunal finds that in failing to invoke the grievance procedure the claimant did not act reasonably and thereby failed to discharge the onus placed on her by section 1 of the Act of 1977. Similarly, the claimant did not act reasonably in failing to answer the respondent's telephone calls or respond in any way to his call to her house, which although subsequent to the dismissal, may at that early stage have provided an opportunity for the resolution of the problems between the parties. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

