

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

CASE NO.

RP1622/2010
MN1152/2010
UD1190/2010

against

EMPLOYER

- respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr J. Horan
Mr F. Keoghane

heard this claim at Dublin on 25th October 2011, 12th January 2012 and 13th January 2012

Representation:

Claimant: Ms. EJ Walsh B.L. instructed by Ms Maeve B Dooley, James J Kelly & Son,
Solicitors, Templemore, Co Tipperary

Respondent: Mr. Conor Hannaway, SHRC Limited, Heather House, Heather Road, Sandyford
Business Park, Dublin 18

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is primarily involved in environmental consulting and laboratory testing services. IS is Managing Director. One element of the company's work takes place in the company's laboratories carrying out laboratory analysis. Another element involves monitoring carried out by personnel who go on site regularly to collect samples and carry out monitoring, eg: noise and

dust. The work is generally environmental based with some health and safety.

In 2009 the company lost a number of major contracts. Changes were needed and staff were informed that hours had to be cut and there was a requirement to reduce wages of some staff. Some staff were placed on short-time working patterns. At this stage there were no redundancies and the company had never had a redundancy situation.

Also in 2009 the company tendered for a large contract through the E Tender procurement site. The company worked hard to win this contract and were awarded same in November 2009. This contract (the E project) guaranteed work for the company for a number of years. In order to meet the requirements of the E project the company needed 6 employees working full time on the project.

There were certain requirements set down as part of the project in relation to the delivery of samples collected. There were 5 laboratories nationwide. When a sample was collected it had to be delivered to the laboratory no later than 9:30am the following day. At this stage there was no out of hours option for delivering the samples. This has since changed.

The contract involved staff travelling to different rivers nationwide and collecting water samples. There were two methods of collecting the samples. One was attaching a bucket to a rope and lowering it over a bridge to collect water. This was then transferred into a bottle. There were potential health and safety issues involved and specific training was provided. The company trained staff to carry out risk assessments.

As the claimant had been on reduced working hours since October 2009 she was offered full time work on the E project. The work was broadly similar to the claimant's normal work.

The E project commenced on 17th January 2010 when staff left the office after lunch and travelled to their destination. All staff were told to stay contactable for health and safety reasons and to keep the company informed as to how many samples were collected.

Following the claimant's telephone call to COC (the project leader on the E project) at approximately 3:30pm on 20th January 2010 IS spoke to the claimant. The claimant had been having difficulty collecting a particular sample. IS asked the claimant what the difficulty was and told her that the company needed her to get the sample. The claimant had made an assessment of the risk involved and assessed it as dangerous. IS asked the claimant to explain why she felt it was dangerous but the claimant would not respond. Other companies had been able to collect samples from the same river previously. IS had aerial maps of the area and could not understand what the difficulty was. The risk assessment filled in by the claimant on the day relating to the bridge classified the bridge as high risk. IS and a colleague rearranged to do the sample taking and went to the area to carry out a risk assessment.

Weekly review meetings were held with staff to discuss their experiences and address any problems which arose. At a meeting on 12th February 2010 the claimant raised health and safety concerns. In relation to the availability of other work, IS said she had a half day or a day's work but not enough to keep the claimant employed. Following that meeting the claimant submitted medical certificates to cover her absence for the following two weeks.

The claimant returned to work on the 24th February 2010 after her illness. On the same day IS and MB (Consultancy Manager) met to discuss available work. They met the claimant at 9:30am. At that meeting the claimant's illness was discussed, fines and the claimant's attitude towards working on the E project. The claimant told IS that she was not happy and had felt unhappy since Christmas. The claimant did not want to work on the project. Again IS explained to the claimant that there was no other work available for her to work on. IS told her that she would review all work schedules but there was nothing else. At the end of the meeting IS and MB told the claimant they would review the situation and meet again at the end of the day.

IS and MB discussed the findings of the review and they determined that there would not be enough work for the claimant other than the E project. IS wanted the claimant to continue working in the company. At approximately 3pm they met the claimant. IS informed the claimant that the work schedule had been reviewed and that if she did not want to work on the E project there was nothing else available. IS said she had no choice but to terminate her employment and would give her one month's notice.

IS contended that the termination of the claimant's employment was not regarded as a redundancy situation because there was work available. The claimant was replaced immediately and she did not appeal the decision to dismiss her.

COC liaised with the consultants and tried to help out when staff expressed concerns during the course of their work. He received the first phone call from the claimant on 20th January 2010 in which the claimant told him that she found it unsafe to take a sample from the bridge and that the bridge was too high. The claimant had stated that the bank of the river was steep and slippery and she was not putting her life in danger. The company required a sample however from the river. COC thought it was a perfect site to obtain a sample and the flow of the river did not matter. Other employees had managed a sampling from the bridge without encountering any problem. COC contended that the claimant had said she was not happy doing the work on the E project and that she would give it two to three weeks.

Staff deployed to the E project reported to MB. She had to ensure that the E project got priority. The company had addressed staff concerns before the project commenced. She attended meetings with IS and the claimant and from MB's memory the claimant had contended that she did not want to work on the contract but wanted to remain on a three day week.

Claimant's Case:

The claimant commenced employment in March 2004 as a laboratory technician. She subsequently was promoted to laboratory assistant that year with a further promotion two years later to senior analyst. She left her employment to further her studies and rejoined the company in May 2007. A year later she was promoted to environmental consultant. In that role she was responsible for travelling to different client designated sites throughout the country to take samples from landfills, water wells, rivers etc. and sending them for analysis. Her hours of work were 8 am to 4.30 pm.

Following a period of short time in autumn 2009, the claimant was offered and accepted full time work on the E project. Before the commencement of the E project, the claimant discussed her concerns with her colleague and had legitimate worries about the long distances she would have to travel each day, the long working hours and the risks involved. She felt there were too many routes; long hours and many pick up points each day. She said she would see how the job worked in practice. She contended that no proper procedures were in place in relation to health and safety matters.

Work on the E project commenced on Sunday 17th January 2010 when staff met in the office at 12.00 noon and were given their instructions. The claimant left the office at 15.30 arriving in Co.Mayo at 21.30. Samples to be picked up from several points were difficult and a risk assessment had to be carried out at each point. Samples were exchanged at 10.30 am. She was working from 11 to 13 hours per day and a 72 ½ hour week.

At the end of the first week away she attended a meeting and expressed her concerns. She felt no proper procedures were in place and there was a lack of support from the company. She found it risky. Both she and her colleague A worked alone and travelled to isolated places and worked in the darkness.

On 20th January 2010 she went to collect a sample at a bridge with a 20 metre drop. She was told to take a sample from the bridge. She assessed the area. She telephoned her colleague COC and discussed the risks involved. She established that the sampling of the river was dangerous and told COC so. She felt bullied and intimidated. She subsequently spoke to IS who told her to go through fields if necessary to collect the sample. Conditions were bad on that day, the ground was wet, there were deep slopes, the river was full and the flow was powerful. She felt obliged to make a formal complaint. She worked four weeks on the E project.

On 12th February 2010 the claimant attended a meeting with IS. The issue of fines to the claimant was discussed. The claimant then spoke about the E project. She explained that it was a hard job, too difficult for one person and enquired if there were other jobs still available in the company for her. She knew the company still dealt with some clients.

IS gave out to her about her lateness. The claimant tried to offer an explanation. She was questioned about the job. The claimant always carried out her work on the 8 to 12 points each day. After that meeting she felt stressed and pressurised and a bit intimidated. She was tired. She felt she was putting her life at risk. That evening she visited her doctor and received a medical certificate for the week. She subsequently received a second medical certificate and returned to work on 24th February 2010.

Upon her arrival at work the claimant was asked to submit a written statement following an allegation of bullying she had made a month earlier. The claimant attending a meeting with IS and MB that morning between 9.30 and 10.00 am. IS enquired if she was feeling better and then discussed the issue of the fines. The claimant said it was not sustainable to stay a full year working on the E project. Her colleague A had returned to working in the laboratory. The claimant was sure there was an opportunity to work again with clients. The company still had

clients and had even recruited new clients. After that meeting she handed her written statement to ME. She thought this statement would be discussed at a further meeting.

The claimant attended a second meeting between 2.15 and 2.30 that day. Present were IS and MB. The claimant was told they could only offer her one and half days work. She was thanked and told she could leave the company there and then. Her car and telephone were to be returned.

The claimant told IS that she could not do something like this. She enquired about redundancy and was told she was not entitled. IS shook her hand, told to pack her bag and ME gave her a lift home. She would have been happy to work for some of the company's clients and also do some work on the E project. If she had a choice of working on the E project or having no work at all she would have accepted work on the E project.

She believed that one of the reasons she was dismissed was because she handed in a complaint. She also felt that she was asking too many questions and that paying her salary was too expensive for the company and that the company could find someone else on a cheaper wage. She was not offered a right of appeal.

The claimant was unsuccessful in securing work in Ireland thereafter and was in receipt of social welfare payments until she moved back to her home country and secured work there in November 2010 on a significantly lower salary. She had lived in Ireland for eight years. She enjoyed her work.

Determination:

The claimant was employed as an environmental consultant responsible for travelling to different client designated sites throughout the country to take samples from landfills, water wells and rivers and sending them for analysis. Her hours of work were 8 am to 4.30 pm. Following a period of short time in autumn 2009, the claimant was offered and accepted full time work on the E project. The claimant had concerns about the long distances she had to travel each day, the long working hours and the risks involved. She felt there were too many routes, long hours and too many pick up points each day. She said she would see how the job worked in practice. She felt no proper procedures were in place and there was a lack of support from the company. She found the work she had to undertake risky.

On 20th January 2010 she went to collect a sample at a bridge with a 20 metre drop. She assessed the area and advised her superiors that it was too risky to collect the sample but she was told that she would have to do it anyway. She felt bullied and intimidated, and decided to make a formal complaint.

On 12th February 2010 the claimant attended a meeting with IS. At this meeting the claimant told her employer that her job was too much for one person, too risky and enquired if any other job was available as she was aware that the company still dealt with other clients even though the recession hit them hard. She expected that her concerns would be addressed. However at this meeting IS gave out to her about her lateness and the fact that the claimant had not notified IS about fines which the claimant had incurred. The claimant tried to offer an explanation but felt she wasn't listened to. After that meeting she felt stressed and pressurised and a bit intimidated. That evening she visited her doctor and received a medical certificate for the week. She subsequently received a second medical certificate.

When the claimant returned to work on 24th February 2010 she was asked to submit a statement in relation to the bullying allegation she had made a month earlier. She thought her allegation would be discussed at a further meeting. The claimant attended a second meeting between 2.15 and 2.30 that same day. Present were IS and MB. The claimant was told they could only offer her one and half days work per week. She was thanked and told she could leave the company there and then. Her car and telephone were to be returned. The claimant told IS that she could not do something like this. She enquired about redundancy and was told she was not entitled to it. IS shook her hand, told her to pack her bag and ME gave her a lift home. The claimant believes that one of the reasons she was dismissed was because she made the bullying complaint. She also felt that she was asking too many questions and that paying her salary was too expensive for the company and that the company could find someone else on a cheaper wage. She was not offered a right of appeal.

Having considered the totality of the evidence the Tribunal determines that the claimant was unfairly dismissed and that the employer did not act as a reasonable employer would have acted in the circumstances. There was a complete lack of fair procedures. The Tribunal is not satisfied that the employer investigated the alleged bullying claim. The claimant expected that her bullying allegations would be dealt with at the meetings she had with the respondent or at further meetings when the respondent had an opportunity to investigate the bullying allegation. Instead she found herself dismissed without any adequate warning or being afforded the opportunity to save her job. She was not given any prior notice that these meetings, which she had with the employer, could result in her losing her job. She was not told that she could be accompanied to such meetings. Taking all these matters into consideration the dismissal was clearly unfair.

The Tribunal determines that compensation is the most appropriate remedy and awards the claimant €22,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The claimant received her minimum notice entitlement. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

As remedies under the Unfair Dismissals Acts, 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007 are mutually exclusive, the claim under the Redundancy Payments Acts, 1967 to 2007 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)