

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE
- claimant
against

EMPLOYER
- respondent
EMPLOYER
- respondent

under

CASE NO.

UD2098/10

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. J. O'Neill
Mr S. Mackell

heard this claim at Naas on 19th June 2012.

Representation:

Claimant: Mr Gerard F Burns, Burns Nowlan, Solicitors, 31 Main
Street, Newbridge, Co Kildare

Respondent: Mr. Paul Twomey BL, instructed by Osbornes, Solicitors, Town Centre House,
Naas, Co Kildare

The determination of the Tribunal was as follows:-

Preliminary issue:

The respondent stated that the claimant resigned her position in February, 2009. An e-mail was opened to the Tribunal which allegedly was from the claimant to AS offering her resignation. That resulted in her P45 being issued. The claimant denied that she sent the e-mail and denied that she resigned her position. The claimant never actually ceased her employment. She went on a prearranged holiday for one week and came back to work immediately upon her return. It is clear that there was some confusion over the issue. Based on the fact that the claimant's employment did not come to an end and she was re-employed immediately upon her return from holiday the Tribunal finds that there was no break in her continuity of service.

Claimant's Case:

The respondent is a primary care facility. The claimant worked in the pharmacy and commenced employment on 28th July 2008. She was employed as a Pharmacy Technician. There were nine employees employed, some full time and some part time. Her role entailed aiding and assisting the Pharmacist. She was unaware of grievance procedures in the company.

In September 2008 the claimant while opening up the pharmacy slipped and fell and injured her left foot. She continued to work that day. The following morning she attended her doctor and was referred to her local hospital.

The claimant enjoyed her work in the pharmacy. She furnished the respondent with medical certificates while out sick during her tenure and her supervisor LR told her she would be paid while out sick but she was not.

The claimant did not tender her resignation by email in February 2009. She went on a week's holidays and returned to work. She never broke her service while working for the respondent.

She was absent from work on sick leave in August 2009 and was paid for six weeks during her absence. She also had sick leave absences during 2010 for which she was not paid. The claimant had minor surgery to her ankle in 2010 and did not work after 27th May 2010.

The claimant attended a meeting on 8th September 2010. Present also at that meeting were DK and LR. The meeting took place in the respondent's reception area. People were coming and going in that area. DK stated categorically that unless she dropped her claim she would not be put back on the rota. The claimant was absolutely shocked, upset and annoyed. She had worked very hard during her tenure. She was left in no doubt that because of the respondent's attitude towards her that she would not be put back on the rota at work and her job was no longer available.

The meeting lasted forty minutes. She then walked down the corridor with LR. He handed her two new uniforms. He told her how valued she was and to think about what had been said to her at the meeting.

After that meeting she sought legal advice. She has applied for over 100 positions. While a P45 issued to her it contained errors. She has not secured alternative employment.

Respondent's Case:

LR is supervising pharmacist manager. He commenced employment with the respondent in March 2009. He contended the respondent was very fair. No animosity existed between the claimant and himself. His understanding was that the claimant was treated fairly. The intention of the meeting that took place on 8th September 2010 was to clear the air and welcome the claimant back to work. He was unaware at that time of a claimant's personal injury claim. It was a shock to LR when a letter was received from the claimant's solicitors wherein it was stated that the claimant was of the opinion that she had been placed in a position where she could not return to work and therefore had been constructively dismissed. There was no question that the claimant was not enthusiastic about returning to work.

Both LR and the claimant walked down to the pharmacy after the meeting and he gave her two new uniforms made especially for her. He was expecting the claimant to return to work. She had never been taken off the roster. He did not receive any telephone calls seeking a reference for the claimant.

There were no written minutes recorded of the meeting on 8th September 2010. DK left the company in May 2011. LR contended that he was kept out of the loop in relation to the personal injury claim.

The Financial Controller LT commenced employment in June 2009. At that time the claimant was out on sick leave. He was made aware that the claimant had fallen in the pharmacy.

He passed correspondence from the claimant's solicitors to the respondent's insurers. It was out of the company's hands.

He first learnt that the claimant was not returning to work when a letter dated 10th September 2010 was received from her solicitors. He subsequently passed this correspondence to the company's solicitors. They sought to establish if there was any truth in the allegations contained therein. He left the correspondence in the company's solicitors hands. Following the meeting with the claimant on 8th September 2010 the company had sight of letter from the personal injuries board. The claim was taken very seriously.

LT thought the claimant would have raised her concerns with the Managing Director. At no stage had he any issues with the claimant's performance. LT wanted the claimant to return to work.

DETERMINATION

The Tribunal has carefully considered all of the evidence adduced together with the documentation submitted.

The claimant is alleging she was constructively dismissed from her employment with the respondent company. Section 1 of the Unfair Dismissal Act 1977 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 terminate the contract was a reasonable one.

The claimant had an accident at work in September, 2008. She brought a claim to the Personal Injuries Assessment Board. She was certified unfit to work at the time of the meeting in September, 2010. She received a call to come into the office on the 8th September, 2010 to discuss the matter of her on-going sick leave. During the course of that meeting, the claimant alleged that DK, the CEO, stated if she didn't drop her Personal Injury claim against the respondent Company that she could not return to work. Following that meeting the claimant went straight to her solicitor. Her solicitor wrote to the respondent on the 10th September, 2010 which said letter accurately reflected the claimant's evidence before the Tribunal. The respondent denied that they had knowledge of the claimant's personal injury claim. They did admit that the letter from the Personal Injuries Board was received by the company on the same day as the meeting, 8th September, 2010, but that they did not have sight of it until after the meeting with the claimant. That simply isn't credible when you take the claimant's testimony and her solicitor's letter of the 10th September into account.

Having received the letter of the 10th September, 2010 from the claimant's solicitor setting out the claimant's issues, the respondent chose to do nothing until December, 2010. Even then no attempt was made by the respondent to deny the allegation being made against it or to clarify what they now say was a misunderstanding. If there was a misunderstanding between the claimant and the CEO the respondent should have moved to clarify their position in September, 2010 upon receipt of the aforesaid letter.

The Tribunal is satisfied that there was a breach of the claimant's terms and conditions of employment and on that basis her claim under the Unfair Dismissal Acts succeeds.

The claimant had an obligation to mitigate her loss. There was no supporting documentation produced to the Tribunal in that regard. However, the Tribunal is of the view that she did make continuous efforts to gain employment based on the eleven letters her solicitor wrote to the respondent requesting her P45. In each of those letters the respondent was made aware that the delay in issuing the P45 was frustrating the claimant's attempts to gain employment.

The Tribunal awards the claimant € 35,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)