EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE	UD417/2011,RP527/2011
	MN401/2011

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Lucey

Members: Mr D. Hegarty
Mr J. Flavin

heard this claim at Cork on 24th July 2012

Representation:

Claimant : Ms Rachel O'Flynn B L instructed by
Ms. Fionnuala Breen-Walsh, O'Donnell Breen-Walsh
O'Donoghue, Solicitors, Trinity House, 8 Georges Quay, Cork

Respondent: REP

The determination of the Tribunal was as follows:

Claimant's Case

The claimant who commenced employment with the respondent in 2000 was employed as a clerical officer at its call centre in Cork. By 2009 she was working twenty-five hours over a five-day week. From May of that year and for the following twelve months she was absent from work on a combination of maternity and unpaid leave. The latter was arranged and agreed with her employer by way of a telephone conversation only. In May 2010 she started making enquires about any outstanding holidays she might have and also sought a date for her return to the workplace. The person she was dealing with at the time transferred elsewhere during that process. No definitive arrangement was reached or written correspondence entered into as part of that interaction.

From that time onwards and in the absence of further communication from the respondent the

claimant stayed away from the workplace on the assumption she was now on "holidays". She believed that she could remain absent from work based on her outstanding entitlements under an annual leave arrangement. Her point of contact within the respondent changed to her team leader and the claimant again asked for a return to work date. Such a date was still not given by 28/29 July 2010.

While preparing to go overseas on a family holiday at that time the claimant received a telephone call from her team leader. That call centred around her return to work situation. Her team leader told her she was due back to work the following week. The claimant explained she was about to go away for a week would address this issue upon her return. She also told her team leader that due to child minding issues she was not in a position to return immediately to work when that overseas trip expired. She neither uttered the word resignation nor gave any indication to the caller that she was considering that option. The topic was not raised during that cordial conversation.

Upon returning from her travels the claimant was "absolutely devastated and gutted" to receive her P45 through the post. While still discommoded from that development she contacted her trade union official and later legal practitioners about this issue. The claimant who was also dealing with difficult domestic issues at the time did not contact her team leader or anyone else at the respondent's on her status. She treated the arrival of her P45 as a dismissal. She acknowledged the receipt of a further voice mail message from the team leader delivered in early August and added that this was the last communication she received from her. The claimant told the Tribunal she did not resign nor handed in a letter of resignation. She also never received any written correspondence from the respondent throughout this process concerning her status and arrangement regarding her return to work. The claimant was not called to attend an exit interview contrary to her contract and the respondent's policy as stated in their handbook.

Respondent's Case

The claimant's team leader got involved in this case from mid June 2010. Her first direct contact with her took place at the end of July when she phoned the claimant. The purpose of that call was to inform her that her application for a career break was refused and to discuss a date when she could return to her duties. While the witness had no specific date in mind she wanted the claimant to recommence work within two weeks. The claimant was unable to give such a date citing child minding reasons and then to the team leader's surprise the claimant verbally submitted her resignation. The witness's request that the claimant reconsider that decision was turned down. This team leader then heard the claimant say that she would send in a resignation letter when she returned from her holidays.

This witness then emailed a human resource colleague asking that the payroll section be informed of the claimant's resignation. The team leader also queried whether the claimant's outstanding fifty-five days leave could be offset due to her owing the respondent a specific sum of money. The team leader phoned the claimant on 6 August with the intention of reminding her about the resignation letter. Upon receiving no answer she left a voice message. In the absence of receiving her resignation letter this witness made two more attempts to contact the claimant by mobile phone and both calls and messages went unanswered.

No written communication between the claimant and this witness occurred throughout this process and there was no further direct contact between these two ladies from the end of July 2010. This witness never received a resignation letter from the claimant and no exit interview took place.

A human resource colleague of the team leader told the Tribunal that "something should have happened" when the claimant's authorised leave ended in May 2010. In effect and subsequent to that the claimant was on unauthorised absence. While she was then subject to a zero amount in salary the respondent made and paid her voluntary deductions. This witness who was not surprised that the claimant resigned said the claimant was not due eleven weeks leave. On the contrary she had overtaken her leave. The records were not up to date at the time and the team leader did not know that the system at the time was "a mess".

Determination

The claimant was the first to give evidence as the question of whether or not there was a dismissal was very much in dispute. It was the respondent's contention that the claimant had in fact resigned her position.

The claimant commenced her employment with the respondent in 2000 working twenty-five hours a week. She had previously been employed for sixteen years in a very responsible and challenging position with a stockbroking firm based in Dublin.

The claimant took undocumented maternity leave for six months from 8 May 2009 and availed of a further six months unpaid maternity leave.

There was conflicting evidence whether or not the claimant sought a career break and the phone calls that took place between her team leader and the claimant. There was an absolute conflict of evidence between these two women as to whether the claimant had or had not resigned during the course of those calls.

The witness from the human resource section accepted in cross examination that the respondent's personnel system "was all over the place and records were not kept up to date". At that time the claimant was indebted to her employer in the amount of approximately €2,600.00 regarding debits whilst not drawing down a salary.

Having considered all the evidence carefully the division is unanimously of the view that the claimant did not resign. This finding is to some extent supported by the fact that there was no letter stating that nor was there any indication of a cooling off period. Also no exit interview was convened in accordance with company policy.

In addition and while the division appreciated certain difficult personal matters that the claimant had to deal with on or about this time, the division concludes that she could have taken greater care and interest in establishing her return to the work place.

Neither party gave one month's notice in writing in accordance with the terms of employment between them. It is noted that the SAP system was not fully implemented.

The claim under the Unfair Dismissals Acts, 1977 to 2007 is allowed and the Tribunal determines that re-engagement of the claimant be applied in this case as a fair and just remedy. Therefore the claimant is to be placed back into the position she occupied prior to her dismissal on receipt of this Order. The period from the date of dismissal to the date of re-engagement is to be treated as reckonable service and all statutory entitlements accruing to the claimant during that period are to be preserved and maintained.

It therefore follows that the appeals under the Minimum Notice and Terms of Employment Act, 1973 to 2005, and the Redundancy Payments Acts, 1967 to 2007 cannot succeed in these circumstances

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)