

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

EMPLOYEE - *claimant*

CASE NO.

MN384/2011

UD396/2011

WT126/2011

against

EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. D. Winston  
Mr J. Flannery

heard this claim at Dublin on 22nd June 2012  
and 2nd October 2012

Representation:

Claimant(s) : Ms. Rosemary Mallon BL instructed by Daniel Spring & Co, Solicitors, 50  
Fitzwilliam Square, Dublin 2

Respondent(s) : In Person (not legally represented)

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act 1997 were withdrawn during the course of the hearing.

**Respondent's Case**

The respondent firm practices as patent and trademark agents. (AR), partner in the firm gave evidence of a number of circumstances that led to a downturn in business from 2008 onwards. The general downturn in the economy, upward only rent reviews, clients doing their own work online all led to a reduced workload for the firm. By 2009 the firm had significant cash

low problems and a review of staffing levels was undertaken. The firm needed to reduce salary costs and the claimant's position of audio typist was made redundant. The firm operated a last in first out policy in terms of implementing redundancies and the claimant was made redundant on that basis in October 2010. Her position has not been replaced.

She gave further evidence that the claimant was employed since 2000 and left her employment in 2005. She was re-hired in March 2006. She was employed as an audio typist and she did some other general secretarial work. The claimant made regular errors in her work and she (the witness) raised these errors with the claimant. The claimant did not work unsupervised and she could not have done the work of other employees. She was employed as an audio-typist and was instructed on what work to do. The witness had a good working relationship with the claimant until the Spring of 2010 when she found the claimant's attitude to have changed.

Under cross examination she denied that her attitude towards the claimant was bullying or intimidating. She gave evidence that the claimant's work was careless and contained many errors and she became annoyed with the claimant on two occasions over this. She accepted that she had kicked a waste bin and used foul language towards the claimant on one occasion over a debit note which was missing from a file. She denied that she told the claimant that she would be sacked if her work did not improve. She denied that she told the claimant to lose weight or that she asked her if she had a mental problem. She denied that she criticised her work to other employees and did not ignore the claimant in the workplace. She accepted that the claimant suffered from panic attacks and was aware the claimant had personal issues. She told the Tribunal that she fully understood that the claimant suffered from panic attacks and was very considerate towards her. She suggested that transcendental meditation might be of help to her in that regard.

She was aware that the claimant was on medication and thought that her carelessness in the workplace might be as a result of the medication. She suggested to the claimant that she should discuss it with her doctor. She denied that she asked the claimant for a letter from her doctor. She wrote to the claimant on 8 August 2010 concerning the deterioration in her standard of work. The claimant replied by way of letter dated 10 August 2010 also enclosing a letter from her doctor. All of these letters were opened to the Tribunal. She gave evidence that she suspected the authenticity of the doctor's letter and wrote directly to the doctor by way of letter dated 7 September 2010. She did not receive a reply to this letter. She did not consider it appropriate to request the claimant to attend with a company doctor. She accepted that the claimant was not informed in writing that her position was at risk of redundancy and the respondent did not explore other options with the claimant. She gave evidence that employee (OP) was employed as a records clerk since January 2008 and remains working for the respondent but her work is totally different to that carried out by the claimant. She told the Tribunal that she felt that the claimant was deliberately trying to annoy her. The claimant regularly went downstairs to make phone calls when she had no right to do so.

(JR) partner in the respondent firm gave evidence that a staff meeting was held on 24 August 2010 to advise them of the financial situation facing the company. A copy of the memo from that staff meeting was opened to the Tribunal. The firm's accountant had stated that the firm needed to take action to reduce costs. Staff were informed inter alia at that meeting that (JR) would be undertaking a review of staffing levels and staff would be informed of the outcome in due course. Suggestions were sought from staff regarding a solution to the firm's financial problems and while replies were received from two employees including one from the claimant the suggestions did not provide a solution to the financial problems. A decision was taken to

make employee (JohnR), dictaphone typist redundant as the need for dictaphone typists had reduced and the redundancy was carried out on a last in first out basis. A second review of staffing levels took place in September 2010 due to a further deterioration in the firm's business. The firm had also embraced electronic filing thus further reducing their need for dictaphone typists. At this point the firm had 2.5 dictaphone typists and a decision was taken to make the claimant redundant. This was again done on the basis that the claimant was the last person employed in the firm as a dictaphone typist.

The witness gave further evidence that in parallel with the review of staffing levels a review of staff performance was also undertaken. As part of that process it was noted that the standard of the claimant's work had deteriorated since January 2010 and the firm were working with her to try to find a solution to this problem. The firm met with the claimant on 8 July 2010 to discuss the deterioration in her work performance. The claimant informed them that she was on medication for panic attacks and her medication dosage had recently been doubled. (AR) suggested to the claimant that she attend a counsellor as she, herself had suffered from panic attacks in the past and had found a counsellor useful. In October 2010 the claimant then handed (AR) a letter from her doctor which stated inter alia that her symptoms are more likely to be related to the stress that she encounters at work. This letter was not requested by the firm and the letter raised issues for the firm as the claimant had never raised issues in the previous four years of her employment of suffering from anxiety in the workplace. The witness did not accept that this letter came from the claimant's doctor. As a result of this (AR) wrote to the claimant's doctor by way of letter dated 7 September 2010 to ascertain if the letter had come from her. No reply to (AR'S) letter was received by the firm from the doctor. There was a subsequent exchange of correspondence between the claimant, her solicitor and the respondent firm and this correspondence was opened to the Tribunal.

The witness accepted that the incident where (AR) had kicked the bin had occurred. He did not accept that this was bullying behaviour. He accepted that the claimant had written to (AR) on 28 July 2010 requesting inter alia that she (AR) refrain from intimidating her by shouting and screaming and using foul language. He viewed this as being totally out of context and the letter had come as a bombshell to him. He told the Tribunal that a friendly meeting that he had with the claimant in July had turned into an attack by the claimant. He gave further evidence that (CD) is employed by the firm on a part-time basis generally during the school term. She worked on a part-time basis also for one week in August 2010. She was employed as a telephonist and answered the hall door. She was not doing the same work as the claimant. Employee (OP) had less service than the claimant. She was employed as a records clerk and the claimant could not have fulfilled (OP's) role. He gave evidence that the claimant would not have been capable of doing the work of a record's clerk and she never did data input. He told the Tribunal that the claimant's work performance was of no relevance in the decision to make her redundant.

(AB) gave evidence on behalf of the firm. She told the Tribunal that she knew the claimant for a long time and considered her a friend. She had socialised with her. The claimant returned to work in 2006 after leaving the previous year. The witness gave evidence that the claimant never told her at any point that she felt stressed at work. When the witness saw the claimant's allegations she felt betrayed. She had been aware of personal issues in the claimant's life and had made allowances for her. She gave evidence that the claimant was employed as an audio typist. Her work was always supervised and she did not work on her own. She told the Tribunal that the deterioration in the finances of the firm happened to correspond with the claimant's performance review. The claimant's performance had improved in the past and the firm were trying to improve her performance again.

## Claimant's Case

The claimant gave direct evidence that she started working for the respondent firm in 2000 after completing a FAS secretarial course. She worked until 2005 when she resigned. She returned to work for the respondent in 2006 as she could not find any alternative employment. She was employed as an audio typist and also did other duties such as filing, answering the phone and making deliveries to the Patents office. She also did some validation and inputting on template letters. She believed that she could have done all of the work that employee (OP) did. As an alternative to being made redundant she would have been happy to accept a reduction in salary or placed on part-time work but neither of these were offered to her. She retained a diary of incidents that occurred in the workplace as she was advised to do so by her parents. Extracts from this diary were opened to the Tribunal. She gave evidence that (AR) said that she (the witness) was obese and needed to do something about this. She spoke to her about her health and diet and said that she (AR) would do up a menu for her. She gave further evidence that (AR) said to her that she could not tackle the stairs and said that if she lost weight by Christmas she would give her €50. These comments made her feel very low and reduced her to tears. She gave further evidence that (AR) screamed and roared at her and this made her feel very frightened. She again started to cry and had to leave the building through the back stairs.

At a meeting on 8 July 2010 (AR) stated that she wanted a letter from her (the witness's) doctor by the end of the month. She went to her doctor and got the letter which she gave to (AR). The letter from her doctor linked her illness with her work environment. She accepted that that this was the first time that she told the respondent firm of this. She was never told that there was a recommendation that she was to be made redundant or that her position was at risk of redundancy. She wrote to the firm with cost saving suggestions but (JR) or (AR) never discussed those suggestions with her. She believed that she was made redundant because she stood up for herself as she was not prepared to accept the abuse any longer. The Tribunal heard further evidence in relation to her efforts to secure alternative employment since the termination of her employment with the respondent firm. She is currently employed on a voluntary basis and is in receipt of social welfare payment.

She gave further evidence that she gave the partners in the firm a present on the first occasion that she left the firm in 2005. She left the firm on that occasion on good terms. She was re-employed on the same salary in March 2006. In 2008 she organised a kris kindle for the office Christmas party. She accepted that extracts from her diary relate to incidents which occurred in 2008 and 2010. The incidents which occurred in 2008 were not documented at that time. They were documented in 2010. She accepted that there is nothing documented in her diary extracts for 2009. She told the Tribunal that she attended therapy every day for 5 months in or around January 2010 as a result of the difficulties she had been experiencing with (AR). The problems at work were ongoing and became progressively worse. The dosage of her prescribed medication was doubled from 5mg to 10 mg. She could not recall contacting a SIPTU representative at that time. Correspondence between herself and a SIPTU representative was opened to the Tribunal by the respondent. She told the Tribunal that her work situation was bad up until 2005 but when she returned in 2006 it was beyond bad. She returned to the same workplace as she could not find another job and needed money.

The next witness known as (SS) gave evidence that she worked for the respondent firm from 2004 until 2009. She commenced employment as a cleaner and graduated to secretarial work.

She gave evidence that her room was located opposite (AR's) room and she heard (AR) screaming at the claimant. The claimant was always upset when she came out of (AR's) room. She told the Tribunal that when (AR) picked on you it was impossible to work there and it was very stressful to work for the respondent firm but she accepted that (AR) had helped her in her personal life.

## **Determination**

The Tribunal has carefully considered the evidence adduced in the course of this two day hearing. The claimant comes before the Tribunal claiming that the respondent employer had unfairly selected her redundancy on 5 October 2010. The respondent stands over its decision to make the claimant redundant and the onus rested with the respondent to demonstrate to the Tribunal that it acted fairly and reasonably in all the circumstances.

The claimant had been employed in this particular workplace for the best part of ten years. This is a family run business built up by the endeavours of the two directors and latterly by their daughter who also works in the respondent company. In the course of her evidence the claimant made the case that the director to whom she was directly answerable (AR) was difficult. There was evidence to the effect that (AR) was both ill-tempered and short tempered. The Tribunal has no way of knowing whether objectively this was a reality but is satisfied that subjectively the claimant felt bullied, intimidated and harassed by (AR). Without her employer's knowledge the claimant was recounting the difficulties she perceived she had to her own doctor. In response to this situation the claimant's doctor had put the claimant on medication, and as things came to a head in the summer of 2010 the claimant's doctor wrote a letter to the respondent stating that the claimant had been attending her "for the past 4 years with anxiety symptoms related to work".

Whilst (AR) conceded that she expected a high and exacting standard of work from the claimant she in no way accepted that she bullied or intimidated the claimant whose work unexpectedly deteriorated in 2010. In her evidence (AR) did confirm that on one or two occasions she had lost her temper with the claimant and she was sorry for these incidents. The Tribunal accepts that the respondent did not know and had no way of knowing that the claimant had anxiety relating to her work and in fact the directors were of the belief that the claimant had personal issues that may have affected her performance from time to time.

The Tribunal notes that for the greater proportion of this employer/employee relationship things were harmonious enough. The claimant and the directors' daughter had a friendship in which confidences were shared. On or about 8 July 2010 the claimant was brought before both directors to discuss the deterioration in her standard of work. It is quite clear from the evidence that things got personal at this meeting as the claimant was asked about her medication etc. The respondent denies that they sought a letter from the claimant's doctor but quite clearly the claimant felt obliged to get one to demonstrate to her employer that her anxiety symptoms were being treated. It should be noted that the Tribunal does not doubt the authenticity of the medical report.

The Tribunal accepts that the meeting of 8 July 2010 was the turning point between the parties. The meeting was clearly hostile and the claimant was being heavily criticised by both directors concerning her performance. The claimant in evidence did concede that she defended her position by highlighting the difficulties that she had been having with (AR's) treatment of her in the workplace and these complaints were subsequently detailed by the claimant in her letter of

29 August 2010. Unbeknownst to the claimant, at the same time as her performance had come under scrutiny the directors of the company were also looking at implementing a programme of redundancy.

The evidence to the Tribunal was that the company's financial advisor had indicated that the company needed to reign in its budgets where the turnover had been in a serious decline in line with the overall downturn in the economy. The Tribunal was provided with a detailed account of the meetings conducted by the directors to keep the workforce up to date with the situation as it unfolded. Thus on 24 August 2010 a meeting was held with staff outlining the financial position and a general circular was sent out on 29 September 2010 requesting staff input into possible cost saving opportunities. The Tribunal commends the respondent's efforts to keep the workforce up to date on what was happening.

The respondent never deviated from their position that all redundancies would be executed on a last in first out principle. The Tribunal heard much evidence to the effect that the claimant was only capable and trained up as an audio or Dictaphone typist and was not capable of performing other functions allocated to other members of the workforce. The respondent indicated that the demand for audio typists was diminishing and therefore only that classification of employee came into focus for the purpose of a redundancy. The claimant with 10 years experience in the workforce made the case that she was well capable of performing any and every task being performed by (OP) (CD) and (OP), employees in the company with 2, 5 and 3 years service respectively.

The nature of the work was opened to the Tribunal and the Tribunal finds on balance that the claimant is correct in making the case that her experience and understanding of every aspect of the workplace should have been given more weight. There was no task as explained to the Tribunal that the claimant was not well capable of performing. The Tribunal finds that a reasonable employer would have seen that the claimant had the qualifications to perform the tasks designated to (OP) (CD) and (OP) and the fact that the claimant had seven to eight years longer service should certainly have meant that the claimant would be the last of the four office staff to be made redundant.

In conclusion, the Tribunal must find that the respondent's decision was coloured by the performance issues raised and the level of bad feeling and accusation which arose in the aftermath thereof. The Tribunal is satisfied that the claimant was made redundant for reasons other than on the basis of last in first out and accepts the contention that the respondent was motivated by a desire to have the claimant removed out of the workforce. Accordingly the Tribunal finds that the claimant was unfairly dismissed and awards her compensation in the sum of €18,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

