

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD307/2011

RP354/2011

MN299/2011

WT88/2011

against

EMPLOYER

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O'Leary B L

Members: Mr M. Murphy
Mr O. Nulty

heard this claim at Monaghan on 16th February 2012 and 5th June 2012

Representation:

Claimant:

McEntee & O'Doherty, Solicitors, 20 North Road, Monaghan

Respondent:

A.B. O'Reilly, Dolan & Co., Solicitors, 27 Bridge Street, Cootehill, Co. Cavan

Claimant's case

Dismissal was in dispute and therefore the claimant went into evidence first.

The claimant commenced employment with the respondent as a Quality Controller on 9th May 2005. She was lifting boxes in work on 23rd April 2007 and hurt her back. The next day she went to her doctor who certified her unfit to work and the claimant began to claim Illness Benefit from then onwards.

The claimant sent sick notes to the respondent on a weekly basis up to 5th July 2007 at which time she rang a Director (VC) of the respondent and obtained her agreement not to send sick notes in future. In September 2007 VC told the claimant that there was an up-coming Bord Bia

audit and asked her to come back to work. The claimant told VC that she was not fit to return to work and VC then asked her if she could suggest anyone else who could fill in for her. The claimant did not suggest anyone. VC enquired about a relative of the claimant and the claimant said that VC would have to contact that person herself. The claimant denied, when it was put to her, that she told VC on that occasion that she was not coming back to work and resigned.

In July 2010 the claimant contacted VC and told her that her back was feeling a lot better and she was hoping that the doctor would certify her fit to return to work soon. However VC told her that she had hired someone else to do her job and that it was no longer an option for her to return to work with the respondent. VC said she would send out a P45 and that as the claimant had not sent in certs she had to hire someone else. The claimant said that she had never sent in her notice.

Subsequently, the claimant received a P45 from the respondent and the date of cessation was shown as 22nd July 2010. The claimant therefore contended that she did not resign from her position but that her employment was terminated by the respondent on 22nd July 2010.

Respondent's case:

A former inspector with the National Employment Rights Authority (CR) was sworn into evidence. CR conducted an inspection of the employment records of the respondent in September/October 2009.

In the course of this inspection CR observed that the claimant was still on the employee records of the respondent but had not been paid since April 2007. When he enquired about this CR was told by VC that the claimant had resigned in 2007 and CR suggested that, if that was so, VC should send the claimant her P45.

An employee (MM) of the respondent was sworn into evidence. MM was in the office when VC phoned the claimant in September 2007 and she heard VC saying "so you are not coming back to work then". VC also asked the claimant if she wanted her P45. After the phone call ended, VC told MM that the claimant had resigned but that she did not want a P45 because she was in receipt of illness benefit. VC said to MM "what are we going to do now".

VC gave evidence that the respondent is a small organic producer and the claimant began to work for her in 2005. She was an excellent worker and because of her background was an excellent recruit. In April 2007 she telephoned one night to say she would not be in the next day as her back was causing her a problem. The next day the claimant showed up in a bad way, she was crying. She talked about needing to pay her mortgage. VC signed a form for her so she could have access to benefit. No mention was made of any accident and the claimant always had a problem with her back. Weekly certificates arrived and were kept by the respondent.

In August of 2007 the respondent got notification of a Board Bia audit. VC telephoned the claimant to ask if she was returning to work. The claimant said she wasn't coming back she was resigning. VC offered her more money but the claimant said her husband was working in Armagh and with young children it wouldn't suit her. She did say her sister in law might be interested in a job. VC also asked her if she wanted a P45 and the claimant said no but would telephone if she needed it for anything in the future.

VC didn't know what to do and postponed the audit for a few weeks. In November of 2007 the

claimant arrived with another form, it stated that the claimant had hurt her back while working with the respondent. VC refused to sign it and the medical certificates ceased.

In July 2010 the claimant rang and told VC she was fit to return to work. VC advised her that she had resigned and there was no longer a position for her, she didn't seem surprised and asked for a letter for Social Welfare to claim unemployment benefit. She sent the claimant her P45 and thought no more about things.

Under cross examination stated that there was no accident report form filled in by the claimant. On the day the claimant first called to say she was unable to work VC signed and dated a form for social welfare. She did not tick any boxes on that form, she claimant was only in the place a few minutes, she didn't even read it. VC denied absolutely ever hearing from the claimant that she hoped to return to work.

Determination

After careful consideration to all the evidence the Tribunal noted the claimant's absence from work from November 2007 until her contact with the respondent seeking re-instatement, a period of 2 years and 8 months had elapsed. There was disagreement regarding the conversation that took place in August 2007. The Tribunal accepts that either party could have taken from that conversation what each party had taken. The claimant was the party that was not fulfilling her side of the contract. It was reasonable for the respondent to expect some contact from the claimant during the 2 years and 8 months but there was none.

If the claimant had not indicated her intention to leave in the conversation of August 2007 it would have been reasonable for her to make reports on a continuous basis about her medical progress. Her position of quality controller was very important to the respondent in order that they could comply with the requirements of Board Bia. The claimant was aware of the need for someone to replace her in that position. The claimant was also aware that after one year the replacement would acquire rights for which the respondent would have responsibility. Had the claimant informed the respondent of her progress and a possible date of return the respondent may have been able to make suitable arrangements with her replacement. The claimant by failing to contact the respondent led the respondent to believe she did not intend to return. Consequently the Tribunal determines that the contract of employment was frustrated, in that neither party acknowledged its existence over that period.

Therefore the claims under Claims under the Unfair Dismissals Acts, 1977 To 2007, the Redundancy Payments Acts 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)