

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

claimant

UD210/2011

against

EMPLOYER

respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr C. McHugh
Mr P. Trehy

heard this claim at Dublin on 5th June 2012
and 18th September 2012

Representation:

Claimant(s): Ms. Susan Lennox BL instructed by, Margetson & Greene, Solicitors, 35 Lower
Baggot Street, Dublin 2

Respondent(s): The Counsellor and First Secretary

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant outlined to the Tribunal her educational qualifications and her work experience prior to her taking up employment with the respondent on the 6th August 2006. The Embassy was established in 2004. She was employed as a trade and tourism Attaché and this was the first time that someone had taken on this role. She felt that she had the opportunity to develop trade and tourism links between the two countries. She reported to the former Ambassador on a daily basis. Management meetings took place every Monday and she provided a weekly progress report to the Ambassador. A summary of progress and weekly updates were discussed and the plan for the next week's work was submitted. She was guided and directed on how to undertake her duties. The Ambassador led discussions and obtained reports. The claimant worked at a strong pace and was a very professional person. She accompanied the Ambassador to meetings in Ireland and abroad. She travelled to Lesotho in 2007, she met with

government ministers and ministries of Trade and Tourism and Foreign Affairs. She had a very good working relationship with her colleagues.

Issues arose in 2009 and the work she had undertaken was not acknowledged. The suggestions she made regarding programmes were ignored and she was summoned to various meetings. The first series of meetings commenced in February 2010. A new first secretary and a counsellor commenced employment with the respondent in the summer of 2009.

On the 16th February 2010 she was summoned to a meeting at 5.05p.m. by the counsellor. She was given two minutes' notice of the meeting. It was alleged that she was incompetent and she was asked to recall warnings that she had received regarding her performance. She could not recall any formal warnings regarding her work and she had not received written or oral warnings. She asked the counsellor and the first secretary the nature of the meeting and if it was related to performance or disciplinary. It was not clear to her what the meeting was about.

HR completed an appraisal on all employees once a year. She last completed a performance appraisal in 2007. In a performance appraisal she met with the appraiser in advance and was given the opportunity to complete a form which they went through together.

She deemed the meeting on the 16th February 2010 an ad hoc meeting. She had to answer questions from the first secretary and the counsellor and it was very pressurised. She asked them both to reflect on what she had said regarding how she had undertaken work since commencing with the respondent. The first secretary is the HR person in the respondent. There was pressure on her to provide the respondent with evidence it did not have. She was questioned about her performance and she provided a short summary of the highlights of her career since 2006. She asked to be allowed to respond to their questions. The meeting concluded at 6.30pm.

She felt that their behaviour towards her was not acceptable. What they had documented in writing was not a true reflection of what occurred at the meeting. The counsellor documented the minutes as they spoke. At the end of the meeting the counsellor typed the minutes and she did not see a copy.

On the 19th February 2010 she forwarded the counsellor her response. She felt it was important to have a structured paper in front of her. She received a response from the counsellor that maybe he would revert to her in the afternoon. The next day she did not have any contact from the counsellor. On the 22nd February 2010 the first secretary telephoned her and he told her that both he and the counsellor would like a meeting with her. A management meeting took place that morning. The first secretary then informed her that he was unable to meet her and he asked her for her response document. She told him it was important to meet in person to ascertain if the minutes were a true reflection of what had occurred. She brought two signed hard copies of her response document to the office that afternoon.

On February 24th 2010 the counsellor came to her office and he had prepared a version of the minutes of the 16th February meeting. She was asked to sign the minutes and as she did not have the opportunity to read the minutes she asked for time to read the contents. The minutes were not a true reflection of the meeting and she did not sign them. Scant regard was paid to the comments she had made. The counsellor left her office and she was not told about a warning at that point, it was a conversation about her performance. She had never received a warning prior to that. She provided the first secretary and the counsellor with a short summary

of her achievements.

On the 25th February 2010 she attended a meeting with the first secretary and the counsellor. She offered both of them copies of documents, they refused the hard copy of the second document. They said they were not happy with the content. The revised minutes were not a true reflection of what occurred at the meeting on the 16th February 2010. The counsellor asked her to sign the minutes, the meeting lasted three hours. They referred to warnings that she had received and put the onus on her for documentary evidence. She believed that they were playing with words and not putting her words into the minutes. She was in front of two senior diplomats and this was very challenging. She was detained in the office for at least three hours. She had never been at a meeting like this before.

She did not have the opportunity to respond and there was no document regarding the meeting of the 25th February as the first secretary and counsellor had refused a hard copy of the document. At 4.40p.m on the 25th February 2010 she e- mailed the counsellor her response to the meeting that took place on the 16th February 2010. The counsellor e mailed her and he asked her if she had signed the minutes. The two diplomats wanted a signed document from her to back up unsubstantiated claims. She believed that the Ambassador wanted a signed document regarding her incompetency. There was no documentary evidence of the meeting of the 16th February 2010 on the HR file.

When the counsellor telephoned her and asked her why she sent an e mail on the 25th February 2010 his tone was very aggressive and domineering. The first secretary asked her if she had signed the minutes and he told her this is insubordination. She was not willing to sign a document regarding what was discussed at a previous meeting. She felt she was under pressure to sign the minutes. The notes as discussed were not agreed.

She was signed off from work due to a stress related illness on the 26th February 2010 for a week. When she was ill she was so stressed she was unable to telephone the respondent and her father did so on her behalf. There was no HR document stating that a family member could not contact the respondent.

On returning to work a copy of the first secretary's memo regarding notes on discussions on the performance of the claimant on the 16th February 2010 to the Ambassador on the 26th February 2010 were on her desk. A month elapsed and she received an internal memo dated 23rd March 2010 from the Ambassador. This memo referred to the internal memo of the 26th February 2010 from the first secretary regarding the claimant's performance and she was requested to advise the respondent of the stress related tasks that caused her illness.

On the 30th March 2010 she responded to the Ambassador. She outlined that as a result of the way the performance issues were handled she found this very stressful. Her stress levels regarding her everyday duties were no different than that of an average person. She did not discuss Embassy matters with her father. On the 6th April 2010 she received an internal memo from the Ambassador which referred to her memo of the 30th March 2010 regarding breach of discipline and code of conduct. The claimant stated that she was more than capable of undertaking her role as Attaché. It was the behaviour of the counsellor and the first secretary that had caused her stress.

In August/September 2009 she was authorised to take annual leave to attend her sister's wedding in Mauritius. She applied for the leave in April 2009 and gave five months'

notice. A trade delegation was due to travel to Lesotho at this time and plans were near completion. She left for Mauritius on a Saturday and the delegation went to Lesotho on Saturday/Sunday. She was not invited to Lesotho and all the documentation was prepared. From 2006 until that point there was no HR procedure in the respondent.

By letter dated 7th April 2010 she was invited to a disciplinary hearing on the 29th April 2010 at 11.00a.m and she could bring a representative from the respondent with her. In the disciplinary code and procedure it stated that in relation to a summary dismissal that where an employee had been found guilty of other offences that are detrimental to the lives of other employees or property a disciplinary committee will be set up comprised of the Head of the Mission or a person appointed by him/her and an independent person from outside the organisation who will be impartial and objective and not have a vested interest in the matter. The first secretary was chairman of the panel. She asked the first secretary for details of the charges. She had never been called to a disciplinary meeting before.

On the 15th April 2010 she sent a letter to the first secretary requesting details of the disciplinary panel and documentation regarding the disciplinary code, the procedure in relation to absence and a copy of the grievance procedure and records of any previous warnings relating to her conduct or performance. By letter dated 21st April 2010 the first secretary informed her he could not give her details of the composition of the disciplinary panel. He enclosed a copy of the disciplinary code and procedure. Three days prior to the disciplinary taking place she still did not have the documents she needed.

Present at the meeting on the 29th April 2010 were the claimant, the first secretary, and the Ambassador (the third secretary). The third secretary was the minute taker. At the meeting she felt at a severe disadvantage, the staff that accused her were on the panel, it was not a fair hearing, the respondent had not adhered to its own rules and code of practice. She asked for a copy of the tape and a full transcript of the meeting but did not get them. It was a judge and jury situation. The person who made the allegations heard her response and there was no impartiality. The first secretary who was at the meeting in February 2010 was not involved prior to that and was part of the panel. She had no representative at the meeting and she did not have the opportunity to get a representative in the respondent to bring with her. Two other employees the driver and security were not at management level. At no point was she offered an option as to who she could bring to the meeting.

She was promised that she would be given the outcome of the meeting after three working days and she received a response five weeks later. This was a difficult and stressful time for her. Every obstacle was put in her way to get a fair hearing. The onus was on her to obtain the outcome. She was a professional person and she endeavoured to undertake her work to the best of her ability.

She never used foul language. She did not reveal the contents of the any meetings she had during her employment with the respondent. She was invited to bring a representative of the respondent to the meeting. She was being charged with breaches of the rules of conduct.

She received a letter on the 4th June 2010 as she was going on annual leave. This letter contained the decision from the hearing. She had a performance appraisal with the counsellor on the 25th June 2010. Some sections were not completed by the counsellor. Her overall performance was deemed unsatisfactory and she had scored zero in some areas. She felt her professional work over four years had been totally disregarded. This was the final straw for her

and she had no option but to resign from her position.

She believed that the rating in her appraisal was deliberate. The Ambassador would have conducted the appraisal on the first secretary. She was upset and distraught and she did not agree with the scoring. Barriers and obstacles were put in her way. She had never received a zero rating previously. Her work was of a very high standard. She was forced out of her position due to the intolerable behaviour of the respondent. After she had submitted her resignation she received a letter on the 29th June 2010 from the Ambassador accusing her of deserting her post. In a letter dated 2nd July 2010 she outlined to the Ambassador that she did not have to give one month's notice as it was constructive dismissal and she had no option other than to leave.

She had worked with the respondent since 2006. She was given a Lesotho name and visited the country. On the 27th August 2010 she wrote to the Ambassador regarding her treatment during the last few months of her employment. After she submitted her resignation she was unemployed for the next nine months. She found alternative employment on a contract basis in March 2011 and there is a difference of €20,000 between her previous annual salary and her current employment. This contract was due to expire at the end of September 2012.

In cross examination the claimant stated that she was forced to resign from her job. On the 29th April 2010 she was invited to a disciplinary hearing. She requested documents from the respondent and these documents were not forthcoming. She wrote to the respondent on two occasions and she was informed that it was up to her to remember documents. She was not familiar with the respondent's guidelines. All four diplomats were involved in the whole process. The former Ambassador heard the case and gave the result of the case.

She was charged under section 6(d) of the rules of conduct which related to improper misconduct and insubordination and was guilty of section 6 (f) (i) and (j) of the rules of conduct of her employment contract as follows:- . section 6(f) stated that "you will not use foul language or behave in an offensive manner", section 6 (i) stated "you will not directly reveal or indirectly reveal or use for any purposes, any information coming to your knowledge or acquired by you or the nature of contents of any documents communicated to you either in the course of your duty" and section 6 (j) stated "you will not conduct yourself improperly in your capacity as an employee of the Embassy or conduct yourself improperly any other way that brings the Embassy to disrepute".

She answered the case in the disciplinary hearing. The Ambassador who was the third secretary took the minutes of the disciplinary. She wrote a memo to the Ambassador on the 30th March 2010. As a result of the meeting with the first secretary and the counsellor she felt bullied, harassed and intimidated by the respondent and her complaint was blatantly ignored. The Ambassador replied to her memo but she did not deal with the allegations of bullying and harassment. She firmly believed that there was no other person in the respondent that she could talk to in confidence and as a member of the management team her complaints were overlooked.

She stated that if the Ambassador had acknowledged that the treatment which she had been subjected to over a number of months was wrong she would have been satisfied. It was clear that procedures were not followed and she had to leave. She spoke to the Ambassador in summer 2009 and the Ambassador was under severe pressure to give a relative of a high ranking individual in Lesotho who was living in Ireland a job.

She was not informed by anyone in the respondent that they wanted her to resign. She believed that she had exhausted all avenues before she submitted her resignation. She raised the matters with certain diplomats and they were ignored and overlooked. There was no impartial person that she could go to. She did not consider writing a letter before she resigned as she was under severe pressure, she had health issues and she believed she conducted herself in a professional manner. She could not take it any longer and she felt it was a letter she had to write. She believed it was constructive dismissal. She did not write a threatening letter to the Minister. She is currently employed on a three month rolling contract for which she earns €475.00 per week.

Respondent's Case

The respondents were invited to give evidence and were given time to consider this. They were informed if they did not give evidence the case would be decided on the evidence given by the claimant. The respondents declined to give evidence.

Determination:

The claimant commenced employment, as a Trade and Tourism Attaché, with the Respondent on the 6th August 2006. Her role involved developing trade and tourism links between Ireland and Lesotho. Certain issues arose about her performance and she was summoned, with two minutes' notice, to a meeting on the 16th February 2010 to discuss these matters. She was not satisfied with the minutes of this meeting and refused to sign them. She attended another meeting on the 25th February 2010 with the First Secretary and Counsellor during which she was asked to provide copies of warning she had previously received. The claimant gave evidence that she never received warnings. She found the meeting of the 25th February, which lasted three hours, very stressful.

The claimant was invited to a disciplinary meeting on the 29th April 2010. Prior to the meeting the claimant requested details of the composition of the disciplinary committee, a copy of the grievance procedure and copies of any previous warnings. She was furnished with a copy of the disciplinary procedure but not furnished with the names of the persons sitting on the disciplinary committee. The meeting of the 29th April was attended by the claimant, the First Secretary and the Ambassador. The claimant felt that this meeting was not fair nor in compliance with the respondent's own grievance procedure. The claimant received a letter dated the 4th June 2010 which referred to the disciplinary meeting of the 29th April 2010. This letter warned her about her performance and behaviour. The Tribunal is not satisfied that the disciplinary meeting of the 29th April 2010 was conducted in accordance with the respondent's own disciplinary procedure or in accordance with fair procedures. The claimant underwent a performance appraisal on the 25th June 2010 with the Counsellor. Some sections of the performance appraisal were not completed and her overall performance was deemed unsatisfactory and she had scored a zero in some areas. The claimant felt that her work over four years had been totally disregarded and she had no option but to resign her position. She believed her negative rating was deliberate and she was forced out of her position by the intolerable behaviour of the respondent. The claimant believed that she had exhausted all avenues before resigning. Any matters which she had previously raised with certain diplomats were ignored.

The Tribunal has to decide whether the claimant was constructively dismissed. It is clear that

the claimant resigned from her employment on the 28th June 2010. The claimant is claiming that she was dismissed by construction as defined in the Unfair Dismissals Act 1977 which states that

“dismissal in relation to an employee means the termination by the employee of his contract of employment with his employer whether prior notice of determination was or was not given to the employer, in 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 Tribunal must consider where because of the Employer’s conduct the Claimant was entitled to terminate her contract or it was reasonable for her to do so.

An employee is entitled to terminate the contract only when the employer is guilty of conduct which amounts to a significant breach going to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. In the case of **Brady v Newman UD 330/1979** the Tribunal stated:

“..... an employer is entitled to expect his employee to behave in a manner which will preserve his employer’s reasonable trust and confidence in him so also must the employer behave”.

The Tribunal has to decide whether the employer’s conduct amount to undermining the relation of trust and confidence between the parties in such a way as to go to the root of the contract. The contract test was summarised in the English case **Western Excavating (ECC) Ltd vSharpe (1978) ICR 121** as follows:

“.... If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance”.

A constructive dismissal will occur where an employee terminates his/her Contract of Employment where, because of the employer’s conduct, the employee was entitled to terminate his Contract without notice or where it was reasonable for him to do so. It has been well established that a question of constructive dismissal must be considered under two headings – entitlement and reasonableness. The employee must act reasonably in terminating the Contract of Employment. Resignation must not be the first option taken by the employee and all other options including following the grievance procedure must be explored. An employee must pursue his/her grievance through the procedures laid down before taking the drastic step of resigning.

The Tribunal finds it interesting that the respondent decided not to give evidence even when it was explained to the respondents' representatives that should they not give evidence the Tribunal would decide the case on the uncontroverted evidence of the claimant. The Tribunal gave a short adjournment to the respondent to consider this matter but the respondent having considered the matter still declined to give evidence.

Having considered all the evidence in this case the Tribunal determines that the claimant did act reasonably. She tried to resolve the issue with the respondent prior to resigning, but the

respondent failed to engage in a meaningful way. The Tribunal finds the respondent putting pressure on the claimant to furnish warnings she allegedly received (from the respondent) as bizarre.

The Tribunal further determines that compensation is the most appropriate remedy under the Unfair Dismissals Acts 1977 to 2007, and awards the claimant €40,495.26

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)