

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM OF:**  
EMPLOYEE  
- *claimant*

**CASE NO.**  
UD1775/2010  
MN1732/2010

WT791/2010

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: Mr. T. Ryan  
Members: Mr M. Carr  
Mr N. Dowling

heard this claim at Trim on 5th January 2012  
and 17th April 2012  
and 18th April 2012

**Representation:**

Claimant: Mr. Fergus Dunleavy, Fergus Dunleavy & Co, Solicitors, 69 Merrion Square, Dublin 2

Respondent: Ms. M P Guinness BL instructed by Morgan McManus, Solicitors, The Diamond, Clones, Co. Monaghan

**Claimant's Case**

The claimant gave direct evidence that she commenced employment with the respondent company on 31 March 2008. She was employed as a claims co-ordinator in the commercial claims section and worked as part of a team. She received 3.5 days training and was provided with a contract of employment. She never received the company handbook or a copy of the company's grievance procedures. She reported to KOC who was employed as a regional claims controller. CG was the team leader and KOC and CG sat on either side of her. Within 3 weeks of the commencement of her employment she began to encounter difficulties with KOC. She gave evidence that he was very unapproachable; he was short and snappy towards her. He was sneering towards her and spoke down to her as if she was a dog. She believed that he also commented on her physical appearance to another employee. He did not behave in this manner towards any other employee. While initially she enjoyed a good working relationship with CG

this relationship also deteriorated over a period of time.

She reported the matter to KC in the Human Resources department but did not feel that her complaint was treated seriously. She asked if she could move her desk location as she felt trapped sitting between KOC and CG. This request was not granted and no action was taken by the company. By September 2008 she started to take sick days from work as she could not bear to go to work. When she requested leave from work she would only be informed that her leave application was granted one day prior to her going on leave. Her work duties were not carried out when she was on annual leave and were left for her to complete upon her return to work. In that regard she was treated differently from other employees. When she sought help from a team leader from outside her section she was castigated for doing so by CG as she was told that it undermined their position within the section.

She gave further evidence that she was required to complete a skill-set exam as part of her employment. She failed this exam on the first two occasions and passed it successfully on the third occasion. On the occasions that she failed the exam she received her results after the other employees who had sat the exam, had received theirs. She was also told that she failed the exam by KOC in the presence of other employees. She was then made permanent in February 2009 and was delighted to have been made permanent. She thanked KOC for the fact that she was made permanent and she told the Tribunal that he replied "don't bother thanking me thank CG, if I had my way you would not be here at all". She continued to experience the same treatment in the workplace and it came to a stage where she was physically sick before going to work. She felt isolated and was suffering panic attacks. She spoke with CG about the situation and asked her for help. CG was quite sympathetic but nothing emanated from their discussion. In March 2009 she returned to work from a couple of days absence and was moved to the private motor claims section. The reason given to her for her move was that the commercial claims section was moving to a location in a different premises. She received one days training in the new section and was provided with a further days training. However she did not believe that this was sufficient training.

By the end of March 2009 she was assigned to a new section which she described as the QUIP team. This section was designed to make procedures within the company more understandable. However she received no training whatsoever in this section and did not understand the work involved. She was now on a team where she did not know anything about the work. She felt depressed because of all that had happened. She met with KC from Human Resources again and explained to her as to how she felt. KC replied that she should try the work in the new section. On the following day, 1 April 2009 she did not report for work. She attended her doctor on 4 or 6 April 2009 and was certified as being medically unfit for work. She continued to submit medical certificates and eventually resigned from her position on 24 February 2010.

In the period between April 2009 and 24 February 2010 she engaged in a number of communications with her employer. She met with (IF) Human Resources Manager on 25 May 2009 and also exchanged written correspondence with him. She explained her position to him and an appointment was made for her to be examined by an occupational therapist. She visited the occupational therapist in August 2009 and his report was forwarded to the company by way of letter dated 12 August 2009. He suggested inter alia that a review of the outcome of treatment be carried out in 10-12 weeks if there was a no prospect of a return to work at that stage. She did

not return to the occupational therapist and she was not requested to do so by the company. She subsequently received a letter from IF on 14 September 2009 inviting her to a meeting. This meeting took place on 1 October 2009 and three options were suggested at that meeting. IF suggested that (a) she return to work to a different role, (b) that she return to work and use the grievance procedure or (c) that she makes a further visit to the occupational therapist. However she did not feel that her complaints had been fully investigated and informed the company that her solicitor was dealing with the matter and did not return to work.

Since the termination of her employment she has been unemployed. She had intended to emigrate to Canada but this did not occur due to visa difficulties and she was also pregnant in 2010. She also hoped to complete a carer's course but there were no places available on the course at the time of her application. She hopes to complete this course at a future date.

During cross examination the claimant maintained that she did not receive a copy of the company handbook nor did she remember hearing of the grievance procedure during her induction course. She agreed that CG was her team leader and first point of contact if she had a problem but KOC would be her point of contact if CG was not available.

The claimant told the Tribunal that she had letters snapped from her hands on numerous occasions but this would not have been visible to PC due to the location of their seats in the oval pod, which contained 7 or 8 desks.

When the claimant first complained she went to KC's desk. KC said that she needed to have a manager present as well and they went to a meeting room with PC. The claimant did not agree that PC asked her if she wanted to move seats and it was her that requested a move. The claimant confirmed that she was not aware that PC was monitoring her relationship with KOC after that meeting and he never came to her for an update on the situation following that meeting. However the claimant did accept that she sent an email to KC on 24<sup>th</sup> June confirming that everything was fine but would have preferred if KC had spoke to her directly for an update on the situation.

The claimant confirmed that approximately two weeks after her complaint to PC she sent an email explaining that she was not feeling well and wanted to leave work early to attend the doctor. The claimant assured PC that she had no other issues and those days were behind her.

In October 2008 the claimant attended a probationary review meeting with KC and PC. The claimant felt that PC interrogated her at this meeting and told her that she needed to buck up. The claimant accepted that it is up to an employer to decide at the end of probationary period if a person's employment should be terminated.

The claimant took time off from work in April and June because she felt she could not bear to attend the office. She did not make another complaint to HR at this time nor did she invoke the grievance procedure. There was a period of two months in July and August where she did not take any sick days. Between April and October the claimant took a total of 5.5 days sick leave but agreed that there were periods of time during these months where she had no difficulty. The claimant took annual leave as opposed to sick leave because she did not want to provide PC

with reasons for her absence because he had told her to “buck up” during her probationary review. The claimant had issues with seeking approval for annual leave in so far as the normal process for requesting same was to send an email to CG who would respond by email. But the claimant found that she rarely received a response and had to follow up directly with CG.

The claimant confirmed that at the beginning of her employment she was provided with a lot of one to one time with CG to enable her to meet the required standards but this ceased as time went on. The claimant told the Tribunal that when in private CG and KOC told her that if she needed guidance she should approach them. The claimant felt isolated in her work environment.

The claimant completed a self appraisal form in November which was emailed to CG and KOC. In this form the claimant praised the team she was working with and said that she would not want to work on any other team. She went on further to say that her only dislike in relation to work was travelling on the bus.

In November 2009 the claimant’s manager transferred and FMcC took over. The claimant told the Tribunal that he seemed like a nice guy. The claimant was made permanent in January 2009 and because FMcC was relatively new he sought opinion on the claimant’s potential permanency from KOC and CG. After the probationary meeting in January the claimant thanked KOC who told her not to thank him and if he had his way she would not be made permanent. The claimant agreed that there was documentary evidence from FMcC which stated that both KOC and CG recommended that her performance merited an offer of a permanent position within the company.

On 9<sup>th</sup> April 2009 the claimant sent her first email to IF, the HR Manager, who was on annual leave at the time. He responded on 14<sup>th</sup> April asking the claimant to meet with him to take the matter forward. The claimant emailed him back saying that she did not feel well enough to meet at this stage. IF replied to this and told the claimant to inform him when she was feeling well enough to meet.

On 15<sup>th</sup> April the claimant, via email to IF, requested a copy of the company’s code of conduct and policy on bullying. The claimant confirmed to the Tribunal that she received a copy of the grievance procedure. The claimant did not respond to IF’s email of 15<sup>th</sup> April 2009 and received another email from him on 1<sup>st</sup> May 2009 seeking an update on her intentions regarding her return to work.

On 25<sup>th</sup> May 2009 the claimant and IF arranged to meet in the claimant’s home. They met on 26<sup>th</sup> May 2009 and the claimant explained why she was having problems. The claimant was advised that she could have the matter formally investigated and dealt with under the company’s grievance procedure. She was further advised that IF would need clarification or specific examples of what took place in order for an investigation to be carried out properly. The claimant agreed to consider the matter further and advise IF how she wanted to proceed.

On 15<sup>th</sup> June 2009 the claimant received a follow up email from IF seeking specific details in order to carry out an investigation and the consent form required for the occupational therapist.

The claimant responded to this email informing IF that she would return the consent form soon. She also told him that he would be hearing from her solicitor because she was unhappy with how the matters were handled from the outset. The claimant told the Tribunal that she verbally provided IF with the details of her complaint when she met him face to face.

The claimant returned her consent form on 9<sup>th</sup> July 2009. On 22<sup>nd</sup> July 2009 the claimant received a copy of the company handbook and acknowledgement form. On 27<sup>th</sup> July 2009 the claimant received a letter from IF in respect of her continued absence from work and again seeking specific details and examples regarding her complaint. The letter informed the claimant that any specific concerns or issues would be thoroughly investigated as speedily as possible in order to facilitate her return to work. The claimant was not ready to return to work at this stage.

The claimant attended the company's occupational therapist in August 2009. On 14<sup>th</sup> September 2009 IF wrote to the claimant again inviting her to a meeting. The claimant attended a meeting with IF on 1<sup>st</sup> October 2009. During this meeting the claimant said that she was not fit to go back to work and would leave the decision in the hands of her solicitor and doctor.

The claimant sent IF a copy of her letter of incidents on 1<sup>st</sup> October 2009. The letter was addressed to the claimant's solicitor. The claimant confirmed that the first time she provided IF with written details of her allegations was the 1<sup>st</sup> October 2009.

IF emailed the claimant on 22<sup>nd</sup> October 2009 to provide her with an update on the investigation into her grievances and seeking clarification on some of the points she raised in the written details of her allegations. The claimant responded to this on 30<sup>th</sup> October 2009 saying that the matter will be dealt with by her solicitor. She chose to let her solicitor deal with it because she felt the company was not dealing with the matters properly.

On 24<sup>th</sup> November the claimant received correspondence from IF informing her that after completion of his investigation he could not find any conclusive evidence of the bullying and harassment alleged by the claimant. The claimant was provided with the opportunity to appeal this decision. The claimant was not satisfied with the decision but did not exercise her right to appeal the decision.

The claimant insisted that she provided the company with medical certificates in respect of her absence from work. The claimant confirmed that she was unfit for work for a period of one year and two months, after her resignation from the respondent company, up until approximately April 2011.

### **Respondent's Case**

The Tribunal heard evidence from KOC, the regional claims controller with responsibility for 3 claims handlers. KOC told the Tribunal he was shocked when he first heard of the claimant's issues in 2008. His primary function is to manage investigators and the claimant's first point of contact would be CG.

In June 2008 PC told KOC that he was approached by Human Resources and the claimant about his interaction with her. PC spoke to him at length and told KOC that sometimes he could be

perceived as stern. As a result of this KOC made a conscious effort to be more friendly with all staff.

KOC maintained that he treated the claimant, the same as all employees, with respect and dignity. He addressed everyone's letters in the same manner. There was no victimisation of the claimant and he categorically denies all the allegations made by the claimant.

KOC explained that the claimant's probationary period was extended, which is normal practice if somebody shows potential. The claimant was very good at aspects of the role of claims handler and they felt there was something to work with. In November, FMcC came on board and spoke with KOC and CG at length in respect of the claimant and took recommendations about her performance.

KOC transferred in November 2008 and gave an 11/12 page response to the allegations made by the claimant. He also denied laughing about the claimant's mole.

During cross examination KOC told the tribunal that when PC pointed out that he could be perceived as stern he accepted that and became more mindful of how he interacted with people but he denied treating people badly. He rejected claims that he ever snapped at the claimant, spoke down to her or treated her poorly.

KOC confirmed that all employees receive the same amount of training but training is ongoing, hands on and continual with the team leader. KOC was happy to recommend the claimant for permanency. KOC had no dealings with the claimant after she moved to the private motor team.

KOC accepted that PC spoke to him about the claimant's perception of him but insisted that he never isolated or ignored the claimant. KOC confirmed that there was a breakdown in communication in respect of the claimant's receipt of exam results but denied informing the claimant, in front of other employees, that she had failed her exams.

The Tribunal heard evidence from PC, claims manager within the respondent company. PC outlined the training provided to new employees on commencement within the company. He also explained the team structure that the claimant worked within. The claimant would report to CG, who reported to KOC, who then reported to PC.

In relation to the claimant's complaint in 2008 PC received a phone call from KC wishing to talk about a matter raised by the claimant. The claimant had approached KC and complained about KOC. PC and KC discussed this and decided to approach it informally in line with the grievance procedure. They offered the claimant the opportunity to meet with himself and KC. They met with the claimant on 18<sup>th</sup> June and asked her to outline the matter. The claimant became tearful but PC told her that he wanted to hear the complaint in her words. She told PC that KOC was being harsh and ignorant towards her. She also said that KOC was not providing her with enough time when she had queries. The complaint was solely about KOC. PC let the claimant talk, listened to her and tried to reassure her. He told the claimant that he did not want her to be upset attending work and that KC and himself would deal with the matter. They asked the claimant if she wanted KOC to attend the meeting and she said that she would prefer if he did not

know that she made a complaint insofar as things may get worse. PC advised the claimant that KOC would need to be made aware of the complaint. At the meeting PC asked the claimant for specifics that prompted her to complain about KOC. She could not provide specifics but just found that he was abrupt towards her compared to his treatment of other members of the team.

PC continued to monitor the situation by observing the claimant and KOC's interaction in the workplace. When he went to the claimant at a later stage for an update on the situation he asked the claimant how things were between herself and KOC and the claimant told him that everything was fine. She told him that she could not believe she had made a complaint. He also followed up with KC who said the claimant had been emailing her and told her that everything was fine.

Approximately four weeks after the claimant's complaint about KOC, PC received an email from the claimant saying that she was feeling sick and needed to go home. PC was on the phone at the time. The claimant then came to his desk and asked if she could go home early. PC asked her if everything was ok to which she replied that she thought she may have a kidney infection and might go to the doctor. PC did not ask anything further because the work station was full. When the claimant went back to her desk PC sent her an email to confirm that there was no underlying issue.

### **Determination**

The claimant gave direct evidence that she commenced employment with the respondent company on 31 March 2008. She was employed as a claims co-ordinator in the commercial claims section and worked as part of a team. She reported to KOC who was employed as a regional claims controller. Within 3 weeks of the commencement of her employment she began to encounter difficulties with KOC. She gave evidence that he was very unapproachable, sneering, harsh and ignorant towards her and spoke down to her as if she was a dog. She believed that he also commented on her physical appearance to another employee.

She reported the matter to KC in the Human Resources department but did not feel that her complaint was treated seriously. She gave evidence that her work duties were not carried out when she was on annual leave and were left for her to complete upon her return to work. In that regard she was treated differently from other employees. When she sought help from a team leader from outside her section she was castigated for doing so. She felt isolated and was suffering panic attacks. In March 2009 she returned to work from a couple of days absence and was moved to the private motor claims section. By the end of March 2009 she was assigned to a new section which she described as the QUIP team. This section was designed to make procedures within the company more understandable. She attended her doctor in April 2009 and was certified as being medically unfit for work. She continued to submit medical certificates and eventually resigned from her position on 24 February 2010.

The Tribunal heard evidence from IF, the Human Resources Manager of the respondent company. IF received an email from the claimant on 9<sup>th</sup> April 2009 detailing the reasons for her absence from work and a number of issues she had encountered in the workplace. IF responded to this on 14<sup>th</sup> April 2009 when he returned from annual leave. He asked the claimant if she was available to meet over the following days and asked her to let him know how she wanted to take

things forwards. He wanted to speak to the claimant to fully acknowledge her concerns and where to go from there. He proposed to meet the claimant because he had not met her prior to this. He wanted to know what medical assistance she was receiving and if the company could provide any medical help.

IF advised the claimant that she could have the matter formally investigated and dealt with under the company's grievance procedure. He also advised the claimant that he would need clarification or specific examples of what took place in order to properly carry out an investigation. It was agreed at the meeting that the claimant would consider the matter further and advise IF how she wanted to proceed. On 14<sup>th</sup> September 2009 IF received the written details of the claimant's complaint of bullying. This was the first time he received the written details of the claimant's allegations. On 12<sup>th</sup> October 2009 IF wrote to the claimant informing her that a thorough investigation into her concerns had now commenced and was likely to take a number of weeks. He reminded the claimant of the company's offer of alternative roles she might consider returning to in order to alleviate her concerns and aid her return to work. These alternatives were offered to the claimant prior to the conclusion of the investigation. On 22<sup>nd</sup> October 2009 IF emailed the claimant providing her with an update on the situation and seeking clarification on a number of issues she had raised. The claimant responded to this email saying that he had every opportunity to investigate for the last 6 months. IF was surprised by this and also that the claimant was now leaving the situation in the hands of her solicitor.

On completion of the investigation into the claimant's allegations and complaints IF wrote to the claimant on 24<sup>th</sup> November 2009 detailing his findings. IF found that on balance there was no conclusive evidence of the bullying and harassment taking place that the claimant alleged. The claimant was reminded that the offer of alternative positions within the company were still available to her. The claimant was also provided with a right to appeal the decision. On 25<sup>th</sup> November IF wrote to the claimant inviting her to a meeting to discuss the findings of the investigation. He did not receive a response to this letter.

On 7<sup>th</sup> January 2010 IF wrote to the claimant again seeking a response to his previous correspondence. The claimant did not reply to this letter. On 18<sup>th</sup> January IF wrote to the claimant seeking medical certificates and advising that if the respondent company did not receive direct contact by Wednesday 27<sup>th</sup> January 2010 they would assume that she wished to terminate her employment contract with the respondent company. The claimant emailed IF on 19<sup>th</sup> January 2010 regarding the medical certificates.

On 4<sup>th</sup> February 2010 the claimant emailed IF seeking a copy of the outcome of the investigation. On 8<sup>th</sup> February 2010 IF wrote to the claimant enclosing the outcome of the investigation. He asked the claimant to contact him to discuss her situation.

On 24<sup>th</sup> February 2010 the respondent company received correspondence from the claimant's solicitor in which they were formally notified of the claimant's resignation. The Human Resources Department responded to this letter and advised that the offer of returning to an alternative role in the company was still available to the claimant up until 26<sup>th</sup>



March 2010.

The Tribunal has to decide whether the Claimant was constructively dismissed. It is clear that the Claimant resigned from her employment on 24th February 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 employer of his contract of employment with his employer whether prior 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 employee”.*

The Tribunal must consider where because of the Employer’s conduct the Claimant was entitled to terminate her contract and that 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 of *Western Excavating (ECC) Ltd v Sharpe* (1978) ICR 121 which stated, inter alia:

“.... 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”.

The reasonableness test asks whether an employer conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to tolerate it any longer and justifies the employee leaving.

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Circumstances which render it reasonable for an employee to terminate the contract of employment may constitute ‘constructive dismissal’ and may also justify resignation. If the changing nature of the tasks for which an employee was employed constitutes a repudiation of the contract of employment then a repudiatory breach would occur and a resignation may be considered an unfair dismissal by virtue of constructive dismissal. The facts of this case do not

amount to such a breach of contract to the extent that the employee was left with no reasonable alternative but to leave. Accordingly we consider that applying the case of reasonableness to the Claimant's resignation that she was not constructively dismissed. If the Claimant has an honest belief that she views the work environment as producing intolerable conditions she is

entitled to resign and such resignation may be viewed by the Tribunal as a 'forced resignation' constituting a 'constructive dismissal.' In *Wetherall (Bond St. WI) v. Lynn (E.A.T.)*<sup>1</sup>, Bristow J. stated that:

“Entitlement to terminate a contract by reason of the conduct of the employer is a perfectly familiar concept of the law of contract. Like much else it is easy to formulate but can be difficult to apply...The law of contract for this purpose is that where an employer so conducts himself as to show that he does not intend to be bound by the contract of employment the employee is entitled, at his option, either to treat the contract as at an end, and cease performing his part...The question of what is reasonable in the circumstances having regard to equity which has to be considered in cases of unfair dismissal, applies equally to the facts...It is the conduct of the employer which you must look at...But it is not the epithets which his conduct attracts, but whether you are entitled to treat your contract as at an end, and whether if you exercise your option to do so you have been 'constructively dismissed.'”

Having carefully considered the totality of the evidence adduced the Tribunal could not find any substantial grounds that a dismissal took place in this case. The claimant did not produce sufficient and adequate evidence that the respondent dismissed her even in a constructive fashion. The Claimant did not act reasonably in resigning. She did not appeal the outcome of company's decision in relation to her complaint of bullying and harassment. The Tribunal notes that KOC's manner and that certain strong language was used, which is unacceptable, but this in itself was not sufficient reason for the claimant to resign. Except in very limited situations an employee must exhaust all avenues for dealing with his/her grievances before resigning. Therefore the Claimant's claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

As this was a claim for constructive dismissal the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

The claimant's claim under the Organisation of Working Time Act, 1997 was withdrawn on the third day of the hearing of this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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