EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD1167/2011
	WT471/2011

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Lucey

Members: Mr. D. Hegarty
Mr. J. Flavin

heard this case in Cork on 13 December 2012

Representation:

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Claimant(s):
Mr. Frank Nyhan, Frank Nyhan & Associates, Solicitors,
11 Market Square, (Opposite Courthouse), Mallow, Co. Cork

Respondent(s):
Mr. John Barry, Management Support Services (Ireland) Limited,
The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

On 25 May 2011 the Tribunal received a claim under unfair dismissal and working time legislation in respect of a security officer whose employment was alleged to have been from 15 August 2005 to 23 May 2011. It was alleged that, because of the behaviour of supervisors and managers towards the claimant, she was unable to return to work and that she had suffered from anxiety, stress and depression such that she was forced to leave her employment.

The claim was copied to the respondent and on 19 July 2011 the Tribunal received a written response contending that the respondent had not dismissed the claimant, that the claimant had not been issued with a P45 and that the respondent remained to be in receipt of regular sick certs from her. It was further stated that the respondent's internal grievance procedure had not been used by the claimant but that it did remain open to her. The response was signed by LR (a

HR executive with the respondent).

It was made clear at the start of the Tribunal hearing that only the unfair dismissal claim was proceeding.

Giving sworn testimony, the claimant said that her employment had begun in 2005 and that she had first been on forty-eight hours which had changed to thirty-six hours for three or four years. The claimant did her security work on nights (as her husband worked days and they found this arrangement better for minding children).

In 2009 the employees heard that the employer had had a loss of contract and that another entity (GR) would take over. The claimant understood that GR wanted employees to reapply. The employees did not know what was happening. They heard that the respondent was taking over. Subsequently, the claimant was sent to do airport work from 8.00 p.m. to 8.00 a.m. three times per week. She was now doing the same work for the same management but the respondent was her employer. She had no problems with the airport work.

Towards the end of July 2009 the claimant was moved to SMO (a hospital site). She was told that there would be no more than twenty-four hours per week for her. She said that she would not do mornings. She was told in colourful terms that a manager wanted to put her on days. She stated that she could not do days. She and MK (an operations manager with the respondent) spoke about the dole office but he never got back to her.

At SMO the claimant was not getting hours. She did not know where she stood. She was not getting rosters a week in advance as she should. She was not getting anywhere and could not cope with the stress any more.

The claimant went to a family doctor who advised time off and professional help. The claimant sent medical certs (citing stress and anxiety) to the respondent every week. She spoke to MK on the phone and told him that she could not go back while on a cert. He told her in colourful terms not to quote him the law.

After not returning to the respondent the claimant had now gone back to school for the Leaving Certificate as she hoped to get into nursing.

In cross-examination it was put to the claimant that she had only stayed for one day at the SMO hospital site. She denied this.

The Tribunal was now referred to a letter dated 11 January 2011 from the claimant to MK saying that she hoped to return to work as soon as possible and that she wished to confirm that her "contracted 48hr nights" were available and that he would be able to give her these hours on a permanent basis. She asked him to confirm this in writing. She was told that they might only have twelve hours for her.

The Tribunal was referred to a letter dated 20 January 2011 from LR (the respondent's abovementioned HR executive) to the claimant stating that the claimant's employment contract did not state that she was contracted to work forty-eight hours per week nor that she was contracted to night shifts only. The letter asked the claimant to provide the respondent with a copy if she had anything in writing confirming otherwise.

Reference was made to a letter dated 30 May 2011 from LR to the claimant pointing out that the respondent had received the claimant's claim to the Tribunal under unfair dismissal and working time legislation. The letter advised the claimant that the respondent's understanding was that she remained in employment with the respondent and that she was merely absent on long-term sick leave. The letter reminded the claimant that the respondent had been in receipt of her medical certificates during her period of absence and had sought a potential return-to-work date in January 2011 when she advised that it was her intention to return. LR enclosed a copy of her January letter to the claimant pointing out that the respondent had not received a response apart from further medical certificates.

The said 30 May 2011 letter indicated that LR was very concerned at the allegations in the claimant's claim form to the Tribunal and requested that the claimant contact MK (the abovementioned operations manager) or LR to provide further detail on the claimant's grievance.

The letter told the claimant that there was a grievance procedure (both formal and informal) in her terms of employment and asked her to avail of this internal process assuring her that any complaints would be handled both sensitively and confidentially with the intention of resolution. The claimant was invited to contact LR for further discussion if the claimant had any concerns or questions.

The claimant told the respondent that she had not been satisfied with the respondent's treatment of her and that the respondent would not get back to her.

The Tribunal was now referred to a 20 June 2011 letter from LR to the claimant headed "Follow-up" which was, in fact, a copy of LR's 30 May 2011 letter. The claimant told the Tribunal that she only recalled one letter.

It was put to the claimant that her own letter to the respondent had not made any reference to unacceptable behaviour by MK. The claimant did not dispute this.

Asked why she had not made a complaint, the claimant said that she had spoken to a Jenny of the respondent. She made no reply when it was then put to her that there was no Jenny in the respondent's HR. The claimant acknowledged that she was still giving medical certificates in June 2011.

Giving sworn testimony, JB (the claimant's husband) told the Tribunal that they had come back from holidays at the end of July 2009 and that the claimant had been told that she was being moved to work at the abovementioned SMO hospital where she had started at the beginning of August and where her work had gone on to September.

At this point in the Tribunal hearing, the respondent's representative asked for a direction on the grounds that the claimant had not processed any grievance. The claimant's representative contended that the claimant, having been subjected to abuse, had felt that she could not continue with the respondent and that the claimant had made out a case for a finding of unfair dismissal. After careful consideration the Tribunal ruled that it would not grant the direction requested and that the hearing would proceed.

Giving sworn testimony, MK (the respondent's abovementioned operations manager) said that the respondent had lost a contract to GX (another entity) whereupon a further entity (MCM) had

taken over but had not wanted to take the employees involved. The respondent then looked to assign hours to them. The claimant was only working nights. She was deployed to the SMO site but was there only one night before going out sick in early August 2009.

MK told the Tribunal that, if the claimant was not happy with him, she could go to the respondent's HR and that the trade union could be notified.

Under cross-examination, MK denied ever having used abusive language to the claimant.

Giving sworn testimony, LR confirmed that the claimant could have brought a grievance, that there was no Jenny in HR, that the claimant had failed to respond to correspondence and that the claimant's medical certificates had not indicated that the claimant's illness had been in any way work-related.

Under cross-examination, LR said that she had not personally received the claimant's medical certificates and named a trade union official to whom a grievance could have been raised.

Determination:

The claim lodged under the Organisation of Working Time Act, 1997, falls for want of prosecution.

Regarding the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal carefully considered the evidence adduced but, although the respondent's record-keeping (in terms of payslips and records other than a those on a laptop computer brought to the Tribunal hearing) was far short of what would normally be required, the Tribunal is unanimous in finding that it was not established that the claimant was constructively dismissed. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)