

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1037/2011
RP1397/2011
WT426/2011

MN1157/2011

Against

EMPLOYER

Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B. L.

Members: Mr T. O'Grady
Mr S. O'Donnell

heard this claim at Dublin on 16th October 2012 and 6th December 2012 and 7th December 2012

Representation:

Claimant: In person

Respondent: Mr Finian Finn, Denis I Finn, Solicitors, 5 Lower Hatch Street, Dublin 2

The determination of the Tribunal was as follows:-

Determination:

The claimant is alleging she was constructively dismissed from her employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:
“ the termination by the employee of his contract of employment with this employer whether prior notice of the termination was or was not given to the employer in the 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 burden of proof, which is a very high one, lies with the claimant. She must show that her resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to termination the contract was a reasonable one.

The claimant made her claim for constructive dismissal under three separate headings involving seven separate individuals:

- Bullying and Harassment.
- Inappropriate physical sexual harassment.
- Inappropriate verbal sexual harassment.

The claimant commenced her employment with the respondent in 2007. She had several issues with different members of staff during her time at the crèche. The claimant’s first complaint was made on the 7th January, 2008. In that complaint she states “I have been subject to intimidation/bullying over the past three months”. The subject of that complaint was RW. The complaint was addressed to DG. The tribunal are satisfied that the claimant’s complaint was taken seriously by the respondent and was acted on in a speedy and efficient way. RW was moved to a different location in the building and that seems to have resolved the matter.

The claimant wrote to the respondent of the 13th February, 2008 tendering her resignation. The reasons given for her resignation were “ the working hours involved, as I was not fully aware at the start.” Furthermore she stated “ I would like to say that RK has been a great support to me throughout my brief time at”.

The claimant lodged her next complaint on the 19th November, 2010 in relation to AW, wherein she states “ AW has no concept of personal boundaries and is in breach of health and safety policy (regarding misconduct) this has been going on for two years, on and off, consisting of physical and verbal negative behaviour/ attitude”. The claimant was asked why she did not bring this matter to RK earlier. She stated that she felt she could not as RK and AW lived together and she felt RK would not be objective due to her friendship with AW. When asked why, in those circumstances she didn’t report the matter to DG she said that AG had lodged a complaint to DG previously and it was ignored , therefore she had no confidence that her complaint would be dealt with. That statement was not corroborated by AG’s evidence and was denied by DG herself. The tribunal is of opinion that the claimant could have lodged her complaint earlier and are satisfied that if she had, it would have been dealt with as efficiently as the RW complaint. The claimant stated that she dealt with the matter herself and that she confronted AW about the situation. However, the tribunal notes that the only matter the claimant approached AW about was in relation to a “sexy nanny” comment. Her formal written complaint contained information that was far in excess of the “sexy nanny” complaint.

In any event, when the complaint was lodged the respondent forwarded the matter to mediation immediately. GC carried out the mediation on the 8th December, 2010. It was not successful. The respondent then made a decision to adopt the formal disciplinary procedure. That process was governed by DG. During her investigation of the matter the claimant lodged a complaint against JK. The complaint is dated the 5th December, 2010 however it seems to have been lodged on the 8th December, 2010 according to the evidence. In that complaint the claimant states “JK

ad projected persistent hostility toward me for the past year”. This behaviour is quiet opposite to AWin such a way as it consists of (non verbal) (low impact) (discrete hostility) of lengthy, piercing,dirty looks lasting an abnormal time, between 20 – 30 seconds”

The tribunal find that the matter was fully investigated and a comprehensive report was published. The disciplinary hearing on the 5th January, 2011 was conducted by DG and GC was present as note taker. The claimant in her evidence voiced her concerns at this hearing with GC being present but she did not voice those concerns at the disciplinary meeting. The claimant lodged a complaint on the 8th December, 2010 outlining her issues with the way in which GC conducted the mediation process Furthermore, the claimant was given the right to be heard and was informed of her right to have representation, which she declined. The claimant was also afforded the right to appeal the decision. That report following the disciplinary hearing was made available to the claimant on the 26th January, 2011. In it she was invited to discuss the report with the respondent if she had any issues with it. She was also invited to appeal the decision if she was unhappy with same.

On the 7th February, 2011 the claimant lodged a complaint in relation to her manager RK who allegedly said to the claimant “have you been up all night having sex”. The claimant did not call any witnesses to corroborate her allegation. The allegation was specifically denied by RG who stated that she wouldn’t even ask her close friends such a question and that it took her years before she could discuss such things with her husband. The Tribunal prefer the respondent’s evidence.

On the same date the claimant lodged a complaint in relation to SMcK. In that complaint the claimant states that SMcK called her “ you, you, you smart whore”. The claimant stated in her e-mail of the 7th February, 2011 that she had a witness to this event however that witness was not made available to the Tribunal.

The claimant lodged a second complaint in relation to AW on the 16th March, 2011. The Tribunal note that this complaint occurred in and around the time of the first complaint however it did not form part of the first complaint. The claimant’s explanation for this was that she had to “go back over her memory” to remember it. The Tribunal do not find this to be a credible explanation. The claimant did invoke her right to appeal on the 21st March, 2011. The appeal was to be investigated by LW who was situated in the UK. LW informed the claimant by letter dated the 24th March 2011 that she fully intended to investigate all of her complaints before hearing the appeal. The Tribunal are satisfied based on her evidence and supporting documentation that the matter was fully investigated and that the claimant was an integral part of that investigation. Her report was published in April, 2011. The appeal hearing took place on the 3rd May, 2011. The Tribunal note that the claimant wrote to LW on the 2nd May, 2011 setting out that she was aware that the respondent was intending to close its business and that she felt this was an attempt to break up her witnesses. She stated that she intended to apply for a court hearing. Despite receipt of that letter the appeal hearing went ahead. The claimant then resigned her position on the 5th April, 2011 prior to her appeal hearing decision. The appeal decision was issued by letter dated the 18th May, 2011. The claimant’s appeal was unsuccessful.

The Tribunal must first establish whether or not there was a significant breach of the claimant’s contract. There was no evidence proffered that could lead the Tribunal to conclude that there had been a breach of her contract, significant or otherwise. Having looked at the conduct of both the respondent and the claimant the Tribunal conclude that all of the claimant’s numerous complaints were investigated fully and in a fair and transparent way. During the hearing the claimant did not call or produce evidence to corroborate many of the complaints. The majority of the

omplaints were without merit. Furthermore the Tribunal conclude that many of the complaints were formed inthe claimant’s mind retrospectively. Therefore, in all of the circumstances we must conclude that itwas not reasonable for the claimant to terminate her contract in all the circumstances. Even if the Tribunal had found, which it does not, that it was reasonable for the claimant to terminate hercontract of employment her decision to do so prior to exhausting the appeals process is fatal to herclaim. The claimant was not unfairly dismissed and his claim under the Unfair Dismissals Acts,1977 to 2007 fails.

No evidence was adduced in relation to the Organisation of Working Time Act, 1997 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and these claims fail.

The appeal under the Redundancy Payments Acts, 1967 to 2007, also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)