EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD999/2011
	MN1128/2011

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. L. Tobin
Ms. H. Kelleher

heard this case in Cork on 27 September 2012

Representation:

Claimant(s):
Mr. Donnchadh Kiely BL instructed by
Martin A. Harvey & Co, Solicitors,
Parliament House, 9/10 Georges Quay, Cork
Respondent(s):
Mr. David Gaffney, Coakley Moloney, Solicitors,
49 South Mall, Cork

The determination of the Tribunal was as follows:-

The respondent owns a filling station and supermarket. The claimant commenced employment with the previous owner of the business in 1979. The business was transferred to respondent in 2003 and in or around 2005 the proprietor of the said business (PB) promoted the claimant to the position of manager of the supermarket. Up until 2010 the parties enjoyed a good working relationship.
In summer 2010 the claimant had tendered a letter of resignation because two male employees were not treating her with enough respect. On that occasion the respondent met with the claimant and the other two employees and resolved the matter. At that time it was decided that the claimant would no longer work weekends except that she would cover for PB if he needed Saturdays off.

It was the claimant's position that from summer 2010 she was being bullied by a younger member of staff (AE) and following other instances of bullying on 15 & 16 November 2010 by AE, the claimant told PB that she had enough and left her place of work. The claimant did not respond to PB's text, sent either on 16 or 17 November 2010, suggesting that they discuss the matter over coffee but she contacted PB's wife (PW) the following day and they arranged to meet. From 16 November 2010 the claimant was on different types of leave including annual and sick leave and ultimately never returned to work.

At their first meeting PW observed that the claimant was very upset and stressed. They talked through the claimant's hand-written complaint. At a later meeting PW discussed the respondent's bullying and harassment guidelines with the claimant and she indicated that shewished to pursue her complaint through the formal procedure. The respondent furnished theclaimant's complaint to AE, who provided a written response to the claimant's allegations,admitting that some incidents had occurred between them

PB appointed an external investigator (EI) to investigate the claimant's complaints and hisfindings, contained in a report dated 8 December 2010, were that the matters complained of didnot constitute bullying as defined in the LRC's Code of Practice. At a meeting held on 9December to present the report to the claimant, she indicated to the respondent that she wouldnot work with AE and would not be returning to work while AE continued in the employment. The claimant was unhappy with the extent of EI's investigation and in a letter delivered to therespondent on 24 December 2010 the claimant requested that 'a full and proper and independent investigation … be carried out and that the independent witnesses to the incidentsof 15 &16 November be interviewed'.

PB appointed an independent HR consultant (HRC) to carry out the second investigation. HRC, having interviewed the parties and independent witnesses, also found that that the incidents did not constitute bullying. On 18 February 2011 the report was available and the claimant went to the workplace to collect it. PB wanted the claimant to discuss the report but the claimant wanted to take it away to read it. There was a dispute between the parties as to the content of their conversation and in particular as to the words spoken by PB during the meeting.

It was the claimant's position that PB was shouting and very cross with her, because she hadbeen working for a third party while absent from work, and in a raised voice he twice said toher: "I'm asking you to resign." She knew that there was no point talking to him. Her positionwas that resignation implies having a choice and, as PB was not leaving her any choice in thematter, his words amounted to a dismissal. She lost all faith in PB. As regards working for athird party during her absence, her evidence was that she had worked nine or ten days with astock-taker while she was on sick leave. The claimant denied PB's assertion that during themeeting he asked her to return to work.

PB's position was that he informed the claimant that the second investigator had similarly found that, while there had been inappropriate behaviour, it had not constituted bullying. He further informed the claimant that AE would be remaining on in employment, that he wanted her back at work as he needed a manager, that she would have to let him know if she was returning and stated: "If you refuse to come back … the only alternative you have is to resign." He denied the claimant's assertion that he said to her that, if she did not resign, she would be dismissed. He was hoping she would return as she was good for the business. At one stage the claimant commented that she would be taking her case further and consulting her solicitor. PB

denied the claimant's assertions that he that he asked her twice at the meeting to resign and that he had said that, if she did not resign, she would be dismissed.

By letter of 25 February 2011 the claimant wrote to the respondent informing him that she had not wanted to resign that she had indicated to HRC that she was willing to attend mediation and to carry on with her job but that his asking her to resign was clearly a dismissal and that she was lodging a claim with the EAT.

In his letter of response PB informed the claimant that she had not been dismissed, that her job was still open and asked her to indicate her intentions within seven days. In this letter PB further indicated his willingness to appoint a mediator to resolve the issues between herself and AE and again stated that, if she did not intend returning to work, the alternative would be to resign**.** In April the claimant lodged an unfair dismissal claim with the Tribunal.

Determination:

Dismissal was in dispute in this case. The claimant's case was that at the meeting on 18February PB twice asked her to resign and, in requesting her resignation, he was depriving herof any choice in the matter that this amounted to a dismissal.

Having considered the evidence before it on the relevant events and relationships in the workplace throughout 2010 (and into early 2011) and the claimant's earlier statement that she would not work with AE, the Tribunal, on the balance of probability, accepts PB's version of the conversation that took place between them on 18 February *viz* that, having informed her of the findings of the second investigation and that AE would be remaining on in the employment, he wanted to know if she was returning to work and that he said: "If you refuse to come back … the only alternative you have is to resign". These words do not constitute an ultimatum to resign or be dismissed. The choice to return to her job or to resign was a choice for the claimant to make. In subsequent correspondence PB made clear to the claimant that her job was still open to her. In a context where the claimant had walked out of work on 16 November and during an absence of over three months, on either annual or sick leave, she had worked a number of days for a third party, this was an entirely reasonable request to make. The Tribunal finds that there was not a dismissal in this case. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007, is dismissed. As there was no dismissal the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN